UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 22-10964-mg

- x

In the Matter of:

CELSIUS NETWORK LLC,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

December 7, 2022

9:00 AM

B E F O R E :

HON MARTIN GLENN

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re Phase I of Hybrid Trial RE: Withhold Account Holders. (Doc## 737, 745, 857, 914, 937, 951, 954, 988, 996, 1044, 1192, 1234, 1245, 1288 to 1293, 1338, 1360, 1369, 1370, 1411, 1465, 1531, 1532, 1550, 1563, 1567, 1571 to 1574, 1580, 1581, 1609, 1611, 662)Trial Scheduled for 12/7/22 and 12/8/22 staring at 9 AM each day. Case Management Conference set for 11/22/2022 at 10:00 am.

HEARING re Hybrid Hearing RE: Motion Seeking Entry of an Order (I) Authorizing the Debtors to Reopen Withdrawals for Certain Customers with Respect to Certain Assets Held in the Custody Program and Withhold Accounts and (II) Granting Related Relief (Docket No. 670, 725, 753, 857, 914, 933, 937, 951, 954, 1043, 1058, 1292, 1293, 1311, 1312, 1565, 1574).

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: (indiscernible).

MR. KOENIG: Good morning. We in the courtroom can't hear you. We could hear you a moment before, but we can't hear you anymore. It's sort of muffled.

CLERK: Can you hear me now?

MR. KOENIG: It's still pretty muffled, Deanna.

CLERK: All right. I don't know what to do, then. (audio drops).

MR. KOENIG: Yeah, we're catching maybe ever third word in the courtroom.

CLERK: (indiscernible), are you there? Hear me now?

MR. KOENIG: Yes, Deanna, we could hear that a little bit more clearly.

CLERK: Okay. I have my -- hopefully, this recording goes well. I'm going to try to screen it so that get it, but we'll see. It's just a thing. All right. If you cannot hear me, just interrupt me, okay?

MR. KOENIG: Will do. It sounds much better now. Thank you.

CLERK: Okay, thank you. All right, starting the recording. You know what? I'll restart. Let me stop and restart.

MR. KOENIG: Okay.

(Recess)

CLERK: All right, starting the recording for December 7th, 2022 at 9 a.m. Calling Celsius Networks, Case No. 22-10964. Can we have the parties in the courtroom come to the podium one at a time and give their appearances, please.

MR. KOENIG: Good morning, Deanna. This is Chris Koenig from Kirkland and Ellis on behalf of the Debtors. I'm joined in the courtroom by my colleagues, Elizabeth Jones and Simon Briefel.

CLERK: Okay, thank you. Is there any other counsel in the courtroom?

MS. KOVSKY-APAP: Good morning, Deanna. Deb Kovsky, Troutman Pepper, on behalf of the Ad Hoc Group of Withhold Account Holders.

CLERK: Okay, thank you. Is the U.S. Trustee on the call yet? All right, let's do it this way. One at a time, the parties that need to make an appearance, please raise your hand and I will ask you to unmute and you will give your appearance. Please start doing that.

The parties on the -- on Zoom, please start raising your hand so that we can take your appearance one at a time. Can you hear me?

WOMAN 1: We can hear you.

CLERK: Okay, thank you. Link Smith, please

unmute and take -- and give your appearance.

MR. SMITH: I'm here.

CLERK: Okay, please state now you're involved in the case.

MR. SMITH: Creditor.

CLERK: Okay, thank you. (indiscernible) Butryn.

MR. BUTRYN: Here. I'm a creditor.

CLERK: Okay, thank you. Again, if you're speaking on the record this morning only and you are wanting (indiscernible) -- everyone that speaks at the podium, please keep in mind that your conversations are being recorded, so if you need to speak please try to go away from the podium.

All right, going back to the participants on Zoom. If you are speaking on the record this morning and you have not given your appearance yet, please raise your hand so you can give your appearance. Rebecca, please unmute and give your appearance.

MS. GALLAGHER: Yes, this is Rebecca Gallagher and I may be speaking.

CLERK: Thank you. And you are a creditor, correct?

MS. GALLAGHER: Yes, I am.

CLERK: Thank you so much. All right, anyone else that is speaking on the record this morning? Mr. Wedoff?

MR. WEDOFF: Morning, Deanna. I do not believe I will be speaking, but I am putting my appearance for the examiner in case there are any questions.

CLERK: All right, thank you. All right, anyone else that will be speaking on the record this morning, please raise your hand so we can take your appearance.

Is anyone from the U.S. Trustee's office going to be making appearance this morning? Shara, I know that I admitted you. Is anyone speaking this morning?

Again, taking appearances for this morning's hearing. Is anyone going to be speaking on the record this morning? If you are and you have not given your appearance yet, please raise your hands and I will ask you to unmute and give your appearance.

MR. COLODNY: Hi, Deanna. This is Aaron Colodny from White and Case on behalf of the Official Committee of Unsecured Creditors. With me today is Sam Hershey, David Turetsky, and Andrea Amulic.

CLERK: Okay, thank you, Aaron. Is there anyone else that will be speaking on the record this morning and needs to make an appearance?

MR. ORTIZ: Hi, Deanna.

CLERK: Okay --

MR. ORTIZ: In the courtroom, it's Kyle Ortiz of Togut Segal for the Ad Hoc Group of Custodial Account

Holders. I'm here with my colleague Brian Collier.

CLERK: Okay, thank you. .

MR. ORTIZ: Thank you.

MS. CORNELL: Morning, Deanna. You have Shara Cornell here with the Office of the United States Trustee. I believe that my colleagues, assistant United States Trustee Linda Rifkin and Mark Bruh will also be joining virtually today.

CLERK: Okay, thank you.

MS. CORNELL: Thank you.

CLERK: There any additional participants that are joining that have not given their appearance yet?

Again, for the parties that have joined, if you're going to be speaking on the record this morning and you have not given your appearance, please raise your hands and I will ask you to unmute one at a time and give your appearance.

All right, again, for the parties that have joined, if anyone is (audio drops) their appearance this morning, is speaking on the record and had not given their appearance yet, please unmute your line. Please raise your hand, I'll take your appearance, and I'll ask you to unmute and give your appearance.

Good morning, Mark.

MR. BRUH: Good morning, Deanna. Mark Bruh for

the United States Trustee. I'm not sure if we'll be speaking, but I just wanted to note our appearance.

CLERK: Okay, thank you, and Shara also gave her appearance as well.

MR. BRUH: Okay, great. Thank you, Deanna.

CLERK: All right. Again for the parties that have joined, please raise your hand, use the raise hand function if you're going to be speaking on the record this morning and I will ask you to unmute one at a time and give your appearance.

Yes, Victor, please unmute and give your appearance.

MR. UBIERNA DE LAS HERAS: Good morning, Deanna. I'm Victor Ubierna de las Heras, pro se creditor, and I'll be speaking today on the record.

CLERK: Thank you. All right, for the parties that have joined, are there any participants that are speaking on the record this morning that have not given your appearance? Please use the raise hand function to give your appearance. I'll ask you to unmute one at a time.

All right, for the parties that have joined, if anyone is speaking on the record today and has not given their appearance, please use the raise hand function and I will ask you to unmute one at a time and take your appearance.

All right, for the parties in the courtroom, when are -- is the witness going to be joining?

MR. KOENIG: Deanna, it's Chris Koenig from Kirkland for the record. The parties agreed to a stipulation that --

COURT OFFICER: All rise.

THE COURT: Please be seated. Just give me a chance to refresh my computer.

All right, good morning. We're here in connection with the Ad Hoc Group of Custody Account Holders and Hold Account Holders with respect to the phase one issues. Let's start with the Custody Account Holders. Mr. Ortiz?

MR. ORTIZ: Good morning, Your Honor. Kyle Ortiz, Togut Segal and Segal on behalf of the Custodial Account Holders. Your Honor, I think it might be worthwhile just to do the quick housekeeping for the group.

I think you probably saw the stipulation was filed the way that the parties had set it up and I think the intent for the day is that they're going to divide the two issues and Custody would -- and Withhold would go, Debtors, the Committee, and then response and then the same thing for the follow-up question of if it's not property of the estate, what does that mean for whether or not the Debtors can hold it? So I just want to make sure we're all on the same page on that, Your Honor.

THE COURT: Okay. So I saw on the docket this morning that the joint -- I think what you're talking about is the joint stipulation and agreed order by and among the Debtors, ad hoc groups, and the Official Committee of Unsecured Creditors regarding the phase one issues here.

MR. ORTIZ: That's correct, Your Honor.

THE COURT: Okay. It's approved.

MR. ORTIZ: All right, thank you, Your Honor. So to get into the substance, the first question is whether or not the custodial assets are property of the estate. And Your Honor, we're five months into the case and you've been hearing a lot about this for all of those five months and it's been extensively briefed. So we're going to try to be relatively brief particularly on this issue and obviously any questions you have and then we'll respond to the other parties because I think this is a somewhat interesting case, at least for the Custody account holders in that we're --

THE COURT: Especially --

MR. ORTIZ: -- instance where all of the parties are in agreement.

THE COURT: Hang on a second. Anybody who is tuned in on Zoom needs to mute their line or you will be disconnected from the hearing. Just please mute your, the sound on your line. Go ahead, Mr. Ortiz.

MR. ORTIZ: Thank you, Your Honor. Again, for the

record, Kyle Ortiz of Togut Segal for the Custodial Account Holders.

So I was saying, Your Honor, this is the rare instance where we're standing in a courtroom for a contested hearing where we actually all agree on this point. At least, we agree with the Debtors a hundred percent. I think we agree with the Committee. The precise number is 94 percent of the way that the Custody assets are, by the clear and unambiguous terms of the terms of use, property of the custodial service users and not property of the estate, which makes that pretty unique.

Most of the case law we're looking at, somebody thinks that the contract says something different or that the intent that they all claim they had at the beginning was different than various parties are saying. Here, we have unambiguous language with unambiguous agreement.

THE COURT: Let me just stop you, just so we're clear. I approved the stipulation and that's Paragraph 3 of the stipulation, dealt with the -- all of the exhibits and declarations that were submitted and it was agreed in the stipulation it was all admissible and it is all -- just to be clear for the record, that's all admitted into evidence. But go ahead. I didn't mean to interrupt you.

MR. ORTIZ: No, no worries, Your Honor. I think that's important and appreciate the clarification.

So I'm going to just briefly focus, because we have that 94 percent agreement, on that 6 percent where we do have disagreement and that really relates to a small subset that were subject to pending withdrawals at the time of the freeze that essentially caused them to be overlooked in the Custody wallet rebalancing effort that occurred prior to the petition date.

I'll just cut to the chase, Your Honor. Frankly, we don't think that that distinction matters because the subjective intent of the parties, the Debtors and the account holders was to maintain a custodial account relationship. When we look at the case law in custodial accounts like Judge Posner's Joliet-Will case, says that that relationship is established by contract and depends on the terms under which the transfers were made and the relationship between the parties.

Here, once the customer, whether they were transferring from completely outside the platform or transferring from another service on the platform, makes the requests to transfer assets to the Custody service, such transfer is reflected immediately on the Debtors' internal ledger and the user's account also reflects that and at that point, this custodial relationship is forged, Your Honor.

The subjective intent of the parties in that moment is that the Debtors have no colorable claim for title

over assets held in Custody on their ledger as Custody assets. In our view, the movement of assets between wallets does not impact that relationship. The parties have contracted that the user will transfer digital assets to the Debtor. The Debtor will hold them or digital assets of the same sort -- I actually think that's important. I'll get to that -- in Custody for the user and there is of course consequence to that.

What the user gets is a safe place to hold it, but it gets nothing else. It doesn't get interest. It doesn't get the ability to earn anything and the location of those assets within the Debtors' larger system and how they store them when it's all on the ledger as custodial, in our view, is no more relevant, Your Honor, than in the fungible commodity context with the location of your specific hydrocarbon within a pipeline where it's always agreed that it's your title.

So particularly here where we have a contract that is very clear that you don't get back the exact same coin, but get back a coin of the same kind, I think that makes it no different than the Enron case or the Marchin case with the bonds where as long as you can get back the same thing, which makes, you know, obviously perfect sense in the fungible commodity context, you could never track and write your name on a hydrocarbon and pull it out of the pipeline

at the other end, but everybody agrees that you hold title throughout and that was our contractual agreement. That was the intent of the parties and you're --

THE COURT: Let me just --

MR. ORTIZ: Of course, Your Honor.

THE COURT: Your position is that the internal ledger of selling Celsius accurately reflects the -- we'll call them the Custody assets, whatever wallet they were in, your position is that the internal ledger itself is the document that actually reflects what assets belong to the Custody account holders?

MR. ORTIZ: That's correct, Your Honor, and that's what we believe is the subjective intent of the parties. And again, you have a situation that's a little bit unique in that both parties are going to stand up and say they intended the exact same thing, which is an unusual situation and I do think that is what makes the difference. And maybe it's easiest to look at it through the context of what we call or what the Debtors have called kind of pure Custody.

Because that person who was coming from completely outside the system, the moment they sent assets to the Debtors to hold them in Custody, they formed this custodial relationship and there was never any other type of relationship that these parties would ever have, and that's kind of the simplest way to look at it. They put it in what

essentially is a big tanker of custodial coins, of digital assets, and they have an agreement that someday they'll be able to pull out of that big tanker, some digital assets of the exact same kind, which I think really makes it squarely like Enron.

That was our intent. That was their intent. So that's why we think that we should be in 100 percent agreement instead of 96 percent agreement.

THE COURT: When you say it was the intent, what contract language, if any, are you relying on to say that reflects what you describe as the intent? Because I mean, am I supposed to -- is extrinsic evidence relevant to this? What extensive evidence do I have? But let's start with, what are the contract terms that you believe support your argument?

Let me just as an aside for Ms. Kovsky, one of the -- when we get to the issue of Withhold, that's one of the things that I'm sort of struggling with is there are -- are there contract terms, written contract terms that govern it and what happens in the absence of written contract terms?

But I didn't mean to push you off your argument, but on this point, that's why I'm asking, what are the -- are there specific written contract terms that you're relying on as reflecting what you describe as the intent of the parties?

MR. ORTIZ: Right, Your Honor, and you didn't throw me off my argument. I was actually done with my argument on this particular matter, because we're not trying to -- I know you've had a lot of paper and been in Court a lot the last --

THE COURT: It's been a busy week.

MR. ORTIZ: So we're trying to keep it relatively focused. I mean, look, you can look at, its section, I guess, 4(b) talks about Custody. And I think first, the fact that the section is --

THE COURT: We're talking about Version 8?

MR. ORTIZ: Yeah. I'm sorry, Your Honor. The -- I guess that would be Version 8, April 14th, 2022 Terms of Use.

So I think when you're looking at intent, you know, you could start with the fact that it's in a section called Custody. The intent was that this would be a custodial relationship. It says that that service allows you to store eligible digital assets and I'll acknowledge it says in a Custody wallet. But it's not just that it's in a wallet. It is also that you will not receive any financing fee. You will not receive rewards. You're not going to receive financial compensation (indiscernible) any time, and there's -- I think when you look at the intent, it's clear that it's not going to necessarily be specifically in that

Custody wallet because you might have a third party custodian that is mentioned in there.

And the -- when we talk about whether we want to look at subjective intent and you look at the declaration that the Debtors put in, they talk about how they handled this initially and they had a practice of --

THE COURT: You're talking about Mr. Blonstein's --

MR. ORTIZ: Mr. Blonstein's declaration that it's, you know, initially, immediately reflected on an internal ledger and that there is a periodic manual rebalancing. And I don't think if you took out the word Custody wallet everywhere it showed up, you could still have this section read much like it reads today. You know, the fact that the Debtors attempted to set up Custody wallets and try their best to segregate assets at all times doesn't actually matter for purposes of what you need to do to create a custodial relationship under the case law.

In some senses, they -- I don't think anyone is going to say differently. There was a lot of scrambling at the time of trying to set up a program --

THE COURT: -- set up the Custody program. They were scrambling and --

MR. ORTIZ: Right.

THE COURT: The state regulators were on their

back about it and --

MR. ORTIZ: Right, but --

THE COURT: They weren't ready to go.

MR. ORTIZ: Terms of use, exactly that the Debtors -- and not just people who participated in the Custody program, but everybody who was using their service anywhere acknowledged that this was going to be a new service and that the stuff in that program, in that service, was going to be considered to be custodial assets by both the Debtors and the users. And you know, they at times attempted to have a cushion. And their ability as we -- what we all acknowledge, it was somewhat frantic time to check their ledgers and make sure that they were keeping things in --

THE COURT: Was the rebalancing that they --

MR. ORTIZ: Rebalancing didn't always keep up and really the only reason that these particular assets were missed, interestingly enough, Your Honor, is because they were -- had requested withdrawal. So the only reason they didn't show up as needing to be rebalanced is because they were in the Debtors' ledger on the way back to the customer. Of course, they saw that. I think it's interesting that some of that stuff was put back post-petition. I think that's for another day.

THE COURT: Can you give me an estimate of the value of the assets where account holders sought to withdraw

assets from Celsius rather than just keep them in Custody?

MR. ORTIZ: I want to make sure I understand your question. So --

THE COURT: Because you're --

MR. ORTIZ: The shortfall --

THE COURT: You head down this -- one, stop.

MR. ORTIZ: Sorry.

THE COURT: We headed down this road because you said there's a disagreement about pending withdrawals and that's what my question, maybe inartfully, was trying to focus on. Approximately what was the value of the pending withdrawals that never actually took place?

MR. ORTIZ: Yeah, Your Honor. My understanding and I'm sure one of these gentlemen behind me will correct me if I'm wrong, is that it was in the neighborhood $15 to $16 million, which is roughly 6 percent of the kind of total amount of Custody assets.

THE COURT: That's all right. You can go -- somebody else will have a chance to --

MR. ORTIZ: But yeah, so -- and that one, again, was stuff that had been tracked and the only reason it wasn't then they looked to rebalance before the petition date, they didn't see it was because it had moved to a ledger that said, this is on the way to the customer. So it was -- they were that close. But the intent was always that

that would be Custody and when they returned it, it reflects again in the customer's accounts as Custody.

So we do think under the contract that it was -- that the clear intent was to create a custodial relationship. The debtors made their best efforts to go the extra step of having segregated wallets, which again, I don't think under Joliet-Will or the other caselaw we've seen is actually a necessary step. It was a nice step and hopefully, you know, the customers aren't punished for that. But again, I think if you look back at the simplest case of someone who came from off the platform all together as a pure Custody, if they were to come into this program and then seek to withdraw and be one of the people who got trapped in that little pending withdrawal group, the only relationship they ever had was Custody.

THE COURT: The cases that you're relying on, on this point about you don't need segregated Custody wallets, what you said was Judge Posner decision?

MR. ORTIZ: Yeah, Justice Posner's decision in Joliet-Will and, you know, Your Honor, it's somewhat interesting, there's not as much caselaw as we expected on the concept of Custody generally, but it's interesting because Custody is almost a larger concept that underneath you have additional concepts like Bailey's and special deposits and trusts and other things, but in a very basic,

just creating a custodial relationship, it was looking at -- I think again, yeah, the -- what the contract says, the terms under the transfers and then the relationship that was forged between the parties, and again, I think that's a very important point, that it's really the moment that you say, I'm going to transfer something to the Custody program that the custodial relationship is forged.

And a lot of the stuff that some of the caselaw that's has been cited by other parties that's talking about trust and when you -- Your Honor asked about the lowest intermediate balance test, all that stuff really comes into play if there was a universe where if I go back to the pipeline example or the oil tanker or the, you know, gas tanker, is if somehow there's a leak and there just wasn't enough for everybody.

That only really comes into play if we ever dip below that, but we're only talking about $16 million, Your Honor, so I don't think that really comes into play in the context of there was never a time when the assets and the digital assets that the Debtors held dipped below what they were saying they were holding in Custody program.

So that's all I have initially, unless you have questions, Your Honor, and then we'll respond to the other parties.

THE COURT: I don't have any questions. Okay.

MR. ORTIZ: Thank you, Your Honor.

THE COURT: All right. I thought that -- what did you work out that -- Withhold --

MR. ORTIZ: I thought we were splitting Custody and Withhold. I'm happy for you to go.

MS. KOVSKY-APAP: I -- we can go either way, but I (indiscernible) Custody, Withhold --

THE COURT: I'm happy to -- did you work this out, how you were going to do it?

MS. KOVSKY-APAP: Yeah, it was late last night, Your Honor.

MR. ORTIZ: We --

MS. KOVSKY-APAP: In Paragraph 4 of the stipulation we filed last night at ECF 1623 --

THE COURT: Yes, I have it in front of me.

MS. KOVSKY-APAP: Yes.

MR. ORTIZ: We split it --

MS. KOVSKY-APAP: We go property issue with Custody assets, Custody ad hoc group, Debtors, Committee, Custody ad hoc group.

MR. ORTIZ: And then withholders. I'm happy to --

THE COURT: Go ahead.

MR. ORTIZ: We did sort of change it last night.

MR. KOENIG: Good morning, Your Honor. For the record, Chris Koenig of Kirkland and Ellis for the Debtors.

Your Honor, the Debtors have been evaluating their cryptocurrency -- whether their cryptocurrency assets are property of the estate in various contexts. On Monday, we were talking about Earn. Today we're talking about Custody and Withhold. We don't take this issue lightly. This is a key gating --

THE COURT: You seem to swap your -- change your position between your opening brief and reply, though.

MR. KOENIG: Your Honor, what I would say is we were focused on our opening brief on pure Custody -- pure Withhold. This is with respect to Withhold. I don't --

THE COURT: Yes.

MR. KOENIG: -- think that we've changed our position on --

THE COURT: Okay. Go ahead with your argument. We'll --

MR. KOENIG: Sorry, Your Honor. Today we're talking about Custody and Withhold. We don't take this issue lightly because the outcome of this issue with respect to any one program necessarily affects the other programs and the other customers. If certain cryptocurrency in one program is not property of the state, that means one less digital asset that could be property of the estate and shared ratably among all unsecured creditors.

The way that the Debtors have analyzed this issue

in every situation and every program has been to evaluate the plain language of the terms of use. And as Mr. Ortiz explained, the Debtors, the Custody Ad Hoc Group and the Committee agree that as a threshold matter, the terms of use are clear and unambiguous that Custody assets are not property of the estates.

But the open question is, what are the Custody assets? Is it just those cryptocurrency assets that today are in the Custody fire blocks workspace or is it all assets that are designated in the Debtors' books and records as Custody assets? So I'll focus on the language that Your Honor was asking Mr. Ortiz about because it does say in many places Custody wallet.

But what I want to focus on in Section 4(b) and this is at the bottom of the page. This is at the bottom of the page, the Version 8 of the terms of use was filed at docket No. 393 and I'm referring to Page 533 of 1126 on the top.

THE COURT: Give me a -- let me get his open on my screen.

MR. KOENIG: I'm sorry, Your Honor. Your Honor, I also have a binder with the relevant language, if --

THE COURT: Yeah, that would make my life easier.

MR. KOENIG: May I approach?

THE COURT: Yeah, come up. All right, so that

we're all on the same place, Mr. Koenig has given me ECF Docket No. 393 at Page 533 of 1126.

MR. KOENIG: That's correct, Your Honor. And we've all been reading the language very carefully, as I'm sure you have. And the way that we square the circle here is at the bottom of the page, the language, the last sentence on this page, Page 533, says "Eligible digital assets in a Custody wallet may be commingled with the eligible digital assets of other users and Celsius is under no obligation to return the actual eligible digital assets initially transferred by you to a Custody wallet" -- and then here's the key language -- "but will return eligible digital assets of the identical type reflected in your Celsius account at the time you request such a return."

It doesn't say of the identical type reflected in your Custody wallet. It says of the type reflected in your Celsius account. And so we think that that, Mr. Ortiz --

THE COURT: -- Celsius account, in your view, is the internal ledger --

MR. KOENIG: That's right.

THE COURT: -- that Celsius was maintaining?

MR. KOENIG: That's right, Your Honor. And what's more, the Committee's position that only the assets that are actually in the Custody wallet, the Custody fire blocks workspace, I mean, are property of the customers could lead

to an absurd result. What if the Debtors never performed any reconciliation despite promising to do so in the agreement? That doesn't seem --

THE COURT: Well, may I -- is their agreement among the parties to this dispute that the internal ledger is accurate?

MR. KOENIG: I've heard no such dispute. I don't want to speak for the other parties but I don't believe that that was raised --

THE COURT: I take it, Mr. Ortiz, that you agree with that? You have to answer audibly.

MR. ORTIZ: Yes, Your Honor.

THE COURT: Okay. And what about the Committee? I don't know who's going to speak for the Committee.

MS. AMULIC: Yeah, we agree.

THE COURT: Yeah. Just state your name.

MS. AMULIC: Oh, sorry. Andrea Amulic for the Committee.

THE COURT: Thank you. Okay. Okay.

MR. KOENIG: So Your Honor, that's really the -- again, Chris Koenig for the Debtors. Your Honor, that's the way that we have read the language.

THE COURT: That's what I was understanding as well, but I just want to make sure we're all on the same page.

MR. KOENIG: Right. Right. And so the language that I just cited from the terms of use is the way that we read, you know, Mr. Ortiz was talking about how, you know, the language really reads the same if you don't read Custody wallets and there's language in here that doesn't mention Custody wallets. So you don't even have to read it out of the language. It's already not in that language in that way.

So how -- was there a designation of a specific line? I don't know which, what ledger. Is this the general ledger? What ledger of the Debtors reflected these balances?

MR. KOENIG: Your Honor, Mr. Blonstein talked about the ledger generally and how --

THE COURT: I know, but I couldn't figure out, you know, there could be lots of pages of a ledger on a screen.

MR. KOENIG: It is many pages on the screen and its many lines and many pages and we've produced that some of the parties here.

THE COURT: Does it have a label, that line?

MR. KOENIG: Yes, it does, that it's, you know --

THE COURT: Somebody know what it is?

MR. KOENIG: Yeah, that it would designate the user and the transaction and how it's to be recorded in the company's books and records. And then that ledger was used

to update the app that each customer saw that said I transferred one Bitcoin from Earn to Custody. And as Mr. Blonstein testified, the transaction occurred immediately on the ledger and in the app, but of course it didn't --

THE COURT: Reconciliation --

MR. KOENIG: The reconciliation --

THE COURT: -- later, but --

MR. KOENIG: Correct.

THE COURT: -- the actual, what you're telling me is that the actual transaction was recorded virtually simultaneous with the -- when the transaction was intended to occur.

MR. KOENIG: And immediately and automatically pursuant to the Debtors' technology.

THE COURT: All right. Okay.

MR. KOENIG: And so --

THE COURT: Somebody could hit on their phone or their app, on their laptop, or whatever and when they made that change, it was instantly reflected in the Debtors' books and records?

MR. KOENIG: That's correct, Your Honor. And again, this all goes back to whether there's contractual language because I'm sure Ms. Kovsky is going to stand up and say well, everything that Mr. Koenig just said is exactly the same for Withhold. We'll get to that, but you

know, just to be clear, we're only arguing this because there -- we believe that there is clear language on Custody that Custody is not property of the estate and that the ledger, you know, enforces that the parties in --

THE COURT: Okay.

MR. KOENIG: Your Honor, I'm not going to repeat everything that Mr. Ortiz said. I think we're largely in agreement with Mr. Ortiz, so I'll cede the lectern to counsel for the Committee, unless you have any further questions for me.

One other thing, Your Honor. I apologize. You asked Mr. Ortiz about the size of the pending withdrawals. We agree that it's around 15 to 16 million, just for the record. Wanted to confirm that.

THE COURT: Okay. Who am I going to hear, from the Committee? Mr. Hershey.

MR. HERSHEY: Good morning, Your Honor. Sam Hershey from White and Case on behalf of the Official Committee of Unsecured Creditors.

I'll just note that I'm joined at counsel table with my colleague Andrea Amulic who will be handling the argument regarding the Withhold issues.

Your Honor, Mr. Ortiz began his presentation by saying he agrees with the Committee 94 percent of the way. I actually think it might be more than that. I was

surprised how much I agree with much of what Mr. Ortiz had to say.

THE COURT: Record that, Mr. Ortiz, for the next case. Okay?

MR. HERSHEY: Our disagreement is going to come soon. Specifically, Mr. Ortiz doesn't argue that the terms of use are ambiguous. I think we all, everyone here agrees they're clear and unambiguous. Yet at the same time, he argues that we should look at --

THE COURT: -- opposed to yesterday morning when all I heard was --

MR. HERSHEY: Correct, Your Honor. We finally have agreement on this point among this group. He at the same time argues, though, that we should look at the pre-petition practices of the Debtors to determine what the parties intended. Those two points are mutually inconsistent. We should not look at the pre-petition practices of the Debtors. We look solely under New York law to the terms of the agreement.

THE COURT: I don't consider extrinsic evidence.

MR. HERSHEY: Thank you, Your Honor.

THE COURT: But what's the point? What's the issue where -- is there a substantive issue that you disagree with Mr. Ortiz?

MR. HERSHEY: Well, having read the examiner's

report, Your Honor, I don't really see how looking at pre-petition practices is going to help his clients, frankly. I think that we all know that the pre-petition accounting practices and ledger entries were a mess and were not reliable or accurate. So that's really his argument to make if he thinks -- you're not going to look at the extrinsic evidence, so we won't hear the argument, but no, I don't think that if we looked at pre-petition practices, they would support his clients, but fortunately we don't have to go there.

I'll go right to the terms of the agreement that everyone agrees governs and is unambiguous. So let's start with Section 4(b) and I'm again looking at Version 8 which is the April 14th, 2022 terms of use, and just to be crystal clear, this is PDF Page 533, Docket No. 393. And this provision's already been mentioned. It provides the Custody account holders' ownership interest in assets in Celsius' possession extends only so far as the assets actually held in Custody wallets, and I'll just read the provision.

"Title to any of your eligible assets in a Custody wallet shall at all times remain with you and not transferred to Celsius." Now, Mr. Ortiz actually mentioned this section. He said, well if we remove the term Custody wallet, it would generally have the same meaning, but we can't remove the term Custody wallet. It's there for a

reason and it matters because Custody wallet is actually a defined term in these terms of use. If Your Honor turns to page -- PDF Page 527 of the same document --

THE COURT: Just give me a second.

MR. HERSHEY: Yeah, take your time, Your Honor, under the definition section.

THE COURT: Okay.

MR. HERSHEY: Okay. Your Honor will see the definition. "Custody wallet means a virtual wallet where all eligible digital assets held therein are custodial assets maintained either by us or a third party institution or other entities selected by Celsius." So in other words, Custody wallets means a specific type of wallet and only that type of wallet. And the definition of Custody wallet reinforces that custodial assets are eligible digital assets held in a virtual Custody wallet. It's not the internal ledger. It's not some other wallet. It's the Custody wallets. Okay.

Now there's one more term in the terms of use that I would like to highlight and I have to ask Your Honor to turn back actually to Page 533 which is the Custody section of the terms of use. Let me know when Your Honor --

THE COURT: I'm there.

MR. HERSHEY: Okay. So the terms of use after saying that only assets in Custody wallets are Custody

assets, the terms of use go on to say that the Custody account holders and solely the Custody account holders bear the risk of Celsius losing their assets, and I'll quote from the terms of use. "As title owner of the assets, you bear all risks of loss. Celsius shall have no liability for any digital asset price fluctuations or any or all loss of digital assets."

So we're in the exact situation contemplated by the terms of use. There has been an approximately $15 million loss of digital assets in the Custody wallets. The Custody group argues that they can force Celsius' other customers to cover that loss by claiming ownership over assets outside the Custody wallets. There is simply no support for that position in the plain language of the terms of use.

To the contrary, the terms of use make crystal clear that Custody account holders bear the sole risk for any loss and can only look to the Custody wallets, the assets to which they have title. Now, in an effort to avoid that plain language, the Custody group points its response brief and Mr. Ortiz's presentation to a series of cases to argue their agreement with Celsius is like a bailment or is like a special deposit which gives them ownership rights beyond what they bargained for.

And so the Custody group's argument seems to be --

I think I heard this in Mr. Ortiz's argument -- that once parties agree to a custodial relationship, all other terms of the contract cease to matter, terms that limit or define the custodial relationship, like the ones I just read, can simply be ignored. There's a custodial --

THE COURT: Can you put this in dollar terms? What was the value of assets in Custody wallet at the petition date and what's the delta that was reflected in the ledger, not reflected in the Custody wallet?

MR. HERSHEY: So the delta, as I understand it, Your Honor, is $15 million.

THE COURT: What's the total?

MR. HERSHEY: I actually am not -- I don't know if any of my team or the Debtors know the total.

THE COURT: Can somebody help me on that?

MR. COLODNY: I believe it's 220 --

THE COURT: Who is speaking?

MR. COLODNY: This is Aaron Colodny --.

THE COURT: Just come to the microphone, Mr. Colodny. Just so we're sure.

MR. COLODNY: Aaron Colodny, counsel for the Official Creditors Committee. I believe it's around $200 to $220 million.

THE COURT: Okay.

MR. HERSHEY: And if I were better at math, Your

Honor, I could've divided $15 million by 94 percent and gotten there, but fortunately Mr. Colodny was able to help me out.

So anyway, the Custody group offers no authority to support the proposition that once a custodial relationship is formed the other terms of the contract can be ignored. In fact, the case that they principally rely on which is the Joliet-Will case, says specifically that the answer as to how to treat assets in the Debtors' possession, whether they are held in Custody or not -- and I'm going to quote -- "depends on the terms under which the grants were made." That's the Joliet-Will case. The pincite is 432.

THE COURT: That's Judge Posner's --

MR. HERSHEY: That's Judge Posner's decision. Exactly, Your Honor. So here the terms as I said plainly provide --

THE COURT: What's the cite of his opinion --

MR. HERSHEY: O, you want me to give the full cite, Your Honor?

THE COURT: Yeah.

MR. HERSHEY: It's In re Joliet-Will County Community, I believe, Action Agency, 847 F.2d 430, pincite 432 (7th Cir. 1988).

THE COURT: Okay, go ahead.

MR. HERSHEY: And indeed in that case, I'll just

note, the Court did in fact look at the terms of the grant to determine whether the assets were held in a custodial relationship. Your Honor, the terms here plainly provide Custody account holders' ownership interest is limited to assets in Custody wallets.

The last thing I'll say Your Honor before ceding the podium is if Your Honor looks at the terms of use again, the term Custody wallet is used with intention. It's used repeatedly to refer to where the assets are held by the Debtors. Now turning to the language that Mr. Koenig cites, that does not expand or change the custodial relationship. That merely repeats the same promise that Celsius made to every customer. We're going to give you back like assets, may not be your assets. Right? That's what every customer claims the right to here and is going to, you know, assert a proof of claim for.

That language, just as it doesn't create a custodial relationship for all other Celsius customers, doesn't create a custodial relationship for these Celsius customers. That custodial relationship is created by the plain language providing that the Custody wallet holds their assets and only the Custody wallet.

Unless Your Honor has any other questions, I'll cede the podium.

THE COURT: Thank you.

MR. HERSHEY: Thank you very much.

THE COURT: All right. Is there anyone else who is speaking to the issue of the Custody account holders? I guess we move to Withhold. Are you --

MR. ORTIZ: I think we have a brief reply, but --

THE COURT: Go ahead.

MR. ORTIZ: I don't know if you want to do --

THE COURT: That's fine. I do. I do want to hear it, Mr. Ortiz.

MR. ORTIZ: So I just wanted to note a couple of things in response to the 6 percent that we have our disagreement on. Counsel pointed to the definition of Custody wallet and if you look at that definition, Your Honor --

THE COURT: That's back on 527 of 1126?

MR. ORTIZ: Yeah, five -- back on 527 of Docket 393. It doesn't go as far as counsel says it does because it -- means a virtual where all digital assets held therein are custodial assets maintained either by us or by a third party institution or other entities selected by Celsius. That just says that if it's a Custody wallet, that -- to be a Custody wallet, it has to have only assets that are custodial assets. It doesn't say that that is the only place a Custody asset could be. So I don't think that definition necessarily changes the analysis that we made.

And then I would also point to the concept in the terms of use that we as title owner bear all the risk of loss. I mean we're either a title owner or we're not. If not, we're the title owner and we bear all risk of loss, then you are acknowledging that we have title over those assets. If you're going to point to that section, then we're the ones that actually have title at that time to bear risk of loss, which I think in any event that's probably a misuse of that language. I think that language is really acknowledging that this is a asset that has a market fluctuation. But in any event you can't --

THE COURT: Let me ask you a question. Let me -- let's assume that I accept Mr. Hershey's construction of the contract, has to be in the Custody wallet and approximately $15 million was reflected on the ledger but not in the Custody wallet. How would that 15 million be treated if I accept that it is -- I don't treat it as Custody?

MR. ORTIZ: I think it's a difficult question which in some senses, Your Honor, to me demonstrates why it should stay in Custody because again, if I look at the simplest case, which I think is the -- what the Debtors called in their motion the pure Custody, so you're sending something over with a contract that says that it's going to be a custodial relationship. It doesn't say, you know, there's going to be four immediate steps and once it reaches

this custodial wallet you have a relationship and in between, we have a creditor-debtor relationship.

If that relationship is never formed, I guess -- you know, but to try to get around to the question you're getting to and not do the lawyerly thing of answering it differently, you know, if you were to rule that, which I don't -- obviously don't think is the right ruling, but if you were to rule that, then they probably have some sort of --

THE COURT: Unsecured claim for breach --

MR. ORTIZ: -- relationship for a breach of contract or a conversion or something of the sort, particularly if --

THE COURT: There's -- I understand your -- I'm not deciding this issue.

MR. ORTIZ: No, I understand that, Your Honor.

THE COURT: But would you agree that the amount reflected in the ledger that was not reflected in the Custody wallet would give rise to an unsecured claim for breach of contract?

MR. ORTIZ: In the universe where we're determining that that -- the contract doesn't go far enough to give those people a Custody relationship, then yes, Your Honor.

THE COURT: Okay. All right. Is there another

point you want to make? I see your colleagues.

MR. ORTIZ: Yeah, no, I think the point he wanted to make is, you know, this is kind of, depending on where we end up today, if -- depending on where you come out on this issue, it's somewhat interesting and I think the Committee argued for pure Custody and for some other folks that the solution is pro rata and I think we would have to collectively, us, the Debtors, and the Committee, really think through whether that's the right answer because if it's specific people who have specific pending withdrawals, that may be the bucket versus, you know, making a pro rata, everybody shares that little bit.

But I don't -- you know, this all came to light, you know, after we had a scheduling order, after we had breached some things, so it's -- I think people are still getting through what that means. But hopefully we never have to reach that because we believe that it's all custodial assets.

THE COURT: Just to be clear, I have not made up my mind on any of this. But what -- if I were to agree with the Committee's view, probably what I would do, would ask that counsel meet and confer and see if they can reach an agreement on what rules should apply, pro rata, lowest intermediate value, just simply unsecured claim, and have you try and resolve that. I'm not -- you know, I don't know

where I'm coming out yet.

MR. ORTIZ: Understood, Your Honor, and I wouldn't expect you to have come out on all these things with the amount of papers you have in front of you. I think I'll acknowledge --

THE COURT: And if I added the pile --

MR. ORTIZ: -- the attorneys --

THE COURT: -- yesterday, would be --

MR. ORTIZ: Right. Well, we have this view that when we file something in ECF, it's just like magically in your head and I will acknowledge --

THE COURT: I wish.

MR. ORTIZ: -- that that's not the case and that the good folks sitting here and you have to do a lot of work to actually get through that and we appreciate that.

THE COURT: Okay.

MR. ORTIZ: Thanks, Your Honor.

THE COURT: There was a hand raised on the screen by Ms. Gallagher. I'll give you an opportunity to speak as long as you're speaking to this issue of the Custody account because that's the issue that the Court is dealing with. So please, go ahead. I can see you on the screen.

MS. GALLAGHER: Yes, Your Honor. I think we're missing an important point here with all the discussion of the terms of service. We're not addressing the fact that

Celsius did not hold a license to offer any Custody services. So without that license, this whole category cannot exist. And we have to look at why they formed this category so hastily.

THE COURT: Ms. Gallagher --

MS. GALLAGHER: -- because the regulations --

THE COURT: May I ask you a question? May I ask you a question? There clearly are states where they could not offer Custody accounts, but there were many where they could. So I don't know what the basis for your statement that they didn't hold a license to have Custody accounts. What are you pointing to?

MS. GALLAGHER: I -- well, Custody is a legal thing, and so to be able to offer Custody, you have to have the licenses for it.

THE COURT: Let me -- do you have some support -- Ms. Gallagher --

MS. GALLAGHER: Company was based in New Jersey --

THE COURT: Ms. Gallagher.

MS. GALLAGHER: Yes.

THE COURT: Do you have --

MS. GALLAGHER: Yes.

THE COURT: -- legal support for the statement you're making? Because it seems contrary to everything that I've read in the papers. That's why we have the Withhold

issues, because those were people in states where Celsius was not eligible to set up the Custody accounts. So they have what were called to the Withhold accounts, but in the vast bulk of the states, they were eligible and did have the Custody program. So what is it that you're relying on to say they had no authority to have Custody accounts?

MS. GALLAGHER: I'm relying on the examiner's report where she made it clear that New Jersey had issued a cease and desist order which was meant to come into effect in December.

THE COURT: And she also makes clear -- she also makes clear in the examiner's report that New Jersey kept extending the deadline by which Celsius had to comply with the cease and desist order. And it was the impending exploration of that deadline that resulted in Celsius, in effect, rushing the Custody program into effect. But the New Jersey cease and desist order, as I understand it, dealt with that they were not eligible to have Earn accounts for unaccredited investors. Do you have some --

MS. GALLAGHER: That's --

THE COURT: I hear what you're saying, but I don't know if you have support for your position, please let me know specifically, not just your argument. Point to some document. Is there something in a New Jersey cease and desist order? Is there something else that you're relying

on?

MS. GALLAGHER: Well, I can't put my hands on anything at this very moment, but I think --

THE COURT: All right. What -- may I ask, Ms. Gallagher, where do you -- Ms. Gallagher, what was your account relationship with Celsius? An Earn account?

MS. GALLAGHER: My account is an Earn account. So for my --

THE COURT: Where do you reside? Where do you reside?

MS. GALLAGHER: I am British, but I reside in the United States.

THE COURT: Where in the United States do you reside?

MS. GALLAGHER: In Tennessee.

THE COURT: Okay. Last question. Whether you're an accredited investor or not.

MS. GALLAGHER: I'm an unaccredited investor.

THE COURT: Okay. All right. I've heard you're argument. Thank you very much, Ms. Gallagher. Is there anybody else who wishes to be heard with respect to the Custody accounts?

CLERK: Judge, there's two more raised hands. There's a Kulpreet -- last name is K-H-A-N-U-J-A, and then Eric Mendelson. We also have a Jeremy Hoffing.

THE COURT: All right. Let me hear -- what was -- spell the first one again, Deanna?

CLERK: Sure. The first name is Kulpreet, K-U-L-P-R-E-E-T, last name is K-H-A-N-U-J-A.

THE COURT: All right. May I hear from you, Mr. Khanuja.

MR. KHANUJA: Thank you, Your Honor. So Your Honor, as you make the decision on the Custody, I want to point out two things. One is essentially the distinction between the pure Custody as well as against the transport Custody. What I mean is there were people who would have used the services and the subjective intent that the counsel mentioned earlier with regards to safekeeping of their assets. There -- I don't have the exact numbers but a very small proportion of the number of the customers actually use Celsius for pure Custody purposes, even beyond the April terms of change uses and all.

Second, most of them, most of the customers were grandfathered based on the, you know, the regulatory issues you just mentioned or some other issues, grandfathered from one account to another, essentially from Earn account into Custody account. Why it's important, it's important because some of the other users from other states do not get -- do not get that kind of preferential treatment; whereas, the account and the terms of service they signed up for

essentially remains the same.

It's just like some -- based on the states they decide on, they get to have a preferential treatment. And secondly, we also know by the transaction analysis some of our colleagues have done, many of the insiders also transferred their assets from one account type like Earn into Custody. So it's very important to make a distinction between what purposes, whether it was a pure Custody or it was grandfathered into Custody or transported into Custody by insiders.

THE COURT: All right, thank you. Deanna, who was the next person who wanted to speak? Because I can't see -- I can't identify them from my screen.

CLERK: No problem, Judge. It's Eric Mendelson.

THE COURT: All right. Mr. Mendelson?

MR. MENDELSON: Yes, good morning, Judge. Eric Mendelson. I have most of my assets in the Custody account as well as in the Earn account and I'm from the great country of Florida. I just want to -- regarding the 6 percent, it sounds like that 6 percent may be or could potentially be Custody holder that were trying to -- individuals that were trying to withdraw potentially from the Earn account and because it wasn't -- because the transaction wasn't executed, it went into the Custody system.

It sounds like Mr. Ortiz and I are aligned in that those assets shouldn't be treated any different than the Custody assets and that 6 percent should not be thrown in the same bucket as Earn. Quite -- I hate using the term preferential, but I would assume and I certainly don't have case law here because I'm not a lawyer, but I assume that being able -- a request of a withdrawal of assets probably takes the most precedence in this case over any other asset class or bucket.

And I just I wanted to point that out, that if individuals were trying to withdraw assets and because Celsius claimed bankruptcy 12, 23 hours later, that they shouldn't just be thrown back into Earn bucket for that reason. Again, I'm not sure if that's where the 6 percent comes from. It sounds like it could potentially be from that. And I just wanted to draw your attention to that, and I do appreciate your time.

THE COURT: Thank you very much, Mr. Mendelson. Deanna, who was the next person?

CLERK: We have Jeremy Hoffing and then two additional parties after that.

THE COURT: All right. Mr. Hoffing.

MR. HOFFING: Good morning, Your Honor. My name's Jeremy Cohen Hoffing. I'm a unaccredited creditor in pure Earn in the State of California. And the argument that I

want to make is that I should not have been grandfathered in to Earn. I think I should have been moved into Custody when those accounts were established. It was clear in the examiner's report that Custody was created to meet the regulatory pressure from the State of New Jersey and a couple other states.

And the creation of Custody was to meet those and it's clear that there was no services offered in Custody that anyone in Earn wouldn't want. Ninety percent of customers were using Earn to receive rewards. And after the creation of Custody, they continued to offer rewards in Earn, incentivizing people to remain in that type of account.

THE COURT: Yeah, I think the point, Mr. Hoffing, is that account holders, whether they were in New Jersey or anywhere else could elect to keep their assets, existing assets in Earn accounts, but any additional deposits they made of assets, if they were unaccredited investors, would have to go into the Custody accounts.

MR. HOFFING: Right.

THE COURT: People were not forced -- there was no requirement. There was no automatic transfer of existing crypto assets from Earn accounts to Custody accounts. People had to either elect to move their assets to Custody or seek to deposit additional assets. Mr. Ortiz, do I have

that correct? I guess I should ask Mr. Koenig but go ahead. Go ahead. Mr. Ortiz, if you have an answer to that, go ahead. What's your view?

MR. ORTIZ: Again, Your Honor, I was looking at my notes and --

THE COURT: Okay. Mr. Koenig, go ahead.

MR. KOENIG: Your Honor, for the record -- Your Honor, for the record, Chris Koenig. Your understanding is correct. The existing unaccredited investors were grandfathered in with respect to their existing assets. They could not deposit new assets into Earn. That had to go into --

THE COURT: There was no automatic transfer --

MR. KOENIG: Correct.

THE COURT: -- of assets from Earn to Custody.

MR. KOENIG: Correct, and the examiner's report explains why, that it was consistent with a settlement that was reached between the regulators in a different company other than Celsius, and so Celsius' intent was to effectuate that settlement, the same settlement that was entered into with the regulators and that other company.

THE COURT: Okay. Thank you very much, Mr. Koenig.

MR. KOENIG: Thank you.

THE COURT: All right.

MR. ORTIZ: And Your Honor -- and now knowing the question, yes, you had to actively move into Custody.

THE COURT: Pay attention now, Mr. Ortiz. I'm sorry. I'm being -- I meant that as a joke.

MR. ORTIZ: Understood, Your Honor.

THE COURT: You're always very well prepared and on point. Deanna, was there someone else who wanted to be heard?

CLERK: Yes --

MR. HOFFING: I wasn't finished, but --

THE COURT: Yes, you have. Go ahead. Who's the next person?

CLERK: So we have three more parties. The next is Gilbert Castillo.

THE COURT: All right, Mr. Castillo --

MR. CASTILLO: Hello, Your Honor. Yes. Can you hear me?

THE COURT: Yes, I can.

MR. CASTILLO: Great --

THE COURT: Go ahead.

MR. CASTILLO: Okay, great. I just wanted to bring to light, we were talking about the pendings and the terms of service. There's Section 11 of terms of service called withdrawal and it says that subject the terms for any of your eligible digital assets that you elect to utilize an

Earn service, you have a call option on all loans made to Celsius, demand immediate complete or partial repayment of any loan at any time through transfer of Custody wallet available to you, a complete, partial withdrawal of eligible digital assets at any time. Such repayment will terminate in whole, a part of your loan to Celsius and you no longer accrue rewards.

So I would, just want to point out that when someone made a pending withdrawal or withdrawal, they used their call option to demand the repayment and I feel that they are entitled to that money and should be considered as Custody as well.

THE COURT: Well, they had to -- if I understand Version 8 of the terms of use, after Version 8 came into effect, withdrawals first had to go into the Custody wallet and then from the Custody wallet to wherever the account holder wanted it to go.

MR. CASTILLO: And --

THE COURT: That's a change from -- stop. That's a change from what existed before the Custody wallet program came into existence in April of 2022. But it had to be the account holder who initiated the effort to withdraw assets, in which case they moved first to the Custody wallet and then to wherever the account holder wanted it to go. Mr. Koenig, do I have that understanding correct?

MR. KOENIG: Your Honor, for the record, Chris Koenig. Your understanding is correct.

THE COURT: Okay. All right.

MR. CASTILLO: But I --

THE COURT: I don't -- Mr. Castillo, I'm not sure I understand your point because it had to be the account holder who initiated the transfer. We're not dealing with deposit of new assets. We're dealing with an effort to withdraw assets from Earn. To do that, you had -- it had to be moved to Custody and then from Custody to wherever the account holder wanted it to go. So --

MR. CASTILLO: Well, in my case it was -- that function was bypassed because when I withdraw, when I made a withdraw request I did a test function with a small amount and it withdrew out of my account immediately. It doesn't -- it didn't go from Earn to Custody. It just went Earn straight to an external wallet. And when I did the larger amount, it was just stopped at that point. So there was a -- my --

THE COURT: Well, when you say you did the larger amount, was it after the pause?

MR. CASTILLO: No. It was before the pause. I did a transaction five minutes before of a small amount as a test transaction and then five minutes later I did the larger amount from my Earn directly to my external wallet,

and it was frozen. Later when I printed the transaction history on the CSV file that they sent to me on email, it shows that the transaction was completed. And then just recently maybe a month ago they changed that and now it's a different, saying that it was not completed.

THE COURT: I mean that -- here's what I would suggest, that you need to communicate with the Debtors' counsel. I don't have any exhibits or paperwork. Your situation is different than the sort of the general issues that the Court is dealing with today. I'm not underestimating the importance of this issue to you. At least on the record today without documents in front of me, I don't want to get into the amounts that you were trying to transfer. Mr. Koenig, can you or one of your colleagues reach out to Mr. Castillo and endeavor to see whether this issue can be either crystallized or resolved or whatever? I don't want to get into the specific amounts at this stage.

MR. KOENIG: Your Honor, Chris Koenig. We will certainly do so. Mr. Castillo, we'll reach out to you but if -- I don't know if we have your email address but my email address is in the signature block of every Court pleading that the Debtors file and likewise, we're just not aware, your individual facts and circumstances but we're happy to take it offline and to look into it with you.

THE COURT: Okay, so Mr. Castillo, reach out to

Mr. Koenig and he'll either himself or have one of his colleagues deal with you directly about it and we'll see whether it can get resolved. Okay, Mr. Castillo?

MR. CASTILLO: Okay, thank you.

THE COURT: All right. Is -- Deanna, is there anybody else who wants to be heard?

CLERK: Yes, two more part -- well, now three. Cam Crews is next.

MR. CREWS: Hello, Your Honor.

THE COURT: Okay. Mr. Crews?

MR. CREWS: Yes.

THE COURT: Go ahead.

MR. CREWS: So I'm predominantly an Earn account holder, although I have since become a Custody account holder subsequent to the bankruptcy filing by transferring a small amount of assets into my wallet. And just so we're aware, that does not result in a transfer on the blockchain; it's just a ledger in the sequel database that Celsius maintains.

Two points. The 94 percent ration that's been discussed, this rebalanced weeks after the pause date. If you were to look, say, at the Ethereum Custody wallet, they had only 65 percent of their obligations met. And I would also urge Your Honor to reference Document 1515 which I prepared. On Page 4, there's a diagram of deposits and

withdrawals which I think can assist in seeing how on the blockchain the payments transfer.

And then lastly, the point that Mr. Ortiz made about Custody not requiring segregated wallets, I'd be very interested in seeing that caselaw if it could be referenced, the docket somewhere because in the context of blockchain, that is very much not in keeping with the way people perceive things. Thank you, Your Honor.

THE COURT: You know, Mr. Crews, I will -- ^have to go back and read Judge Posner's decision, the Joliet-Will case. I think that's the issue where there's a disagreement between Mr. Ortiz and Mr. Hershey, in other words between the Ad Hoc Committee of Custody Holders and the Unsecured Creditors Committee. Mr. Hershey's argument is the terms of use specifically define Custody account and it has to be that, and not just an entry in a ledger that didn't make it into the Custody account.

So the Court is going to have to resolve that issue and I -- the Court will look at your -- you refer to ECF 1515 and look at that before making any decision. Okay? Thank you very much, Mr. Crews.

Deanna, who's next?

CLERK: We have Tony Vejseli -- my apologies if I mispronounce your name.

MR. VEJSELI: Good morning --

THE COURT: Go ahead.

MR. VEJSELI: My name is Tony Vejseli. I am an accredited investor. I have money in Earn, Custody. I have an active learn -- an active loan, excuse me. I'm actually in the Custody Ad Hoc Group. I'm going to be joining the Loan Ad Hoc Group.

I just want to make a note. We already touched on it a little bit, but in order to move your money from Earn to Custody, it was like a three-step process. You have to say that you know what you're doing and that you intend to do it. Also, some people like myself, we ended up putting more money into Celsius because they had a Custody solution. I actually read the terms of service. I liked the part where we hold the title. I ended up putting more money into Custody where it was considered, I guess they're calling it pure Custody now.

I had the opportunity, I had the ability to go from Earn to Custody and I chose to stay in Custody. I moved money from Earn to Custody. Didn't move it back to Earn when I put it in. I think it's very important, you know, that we keep this Custody solution or at least that we honor the Custody contracts. A lot of people like myself, we want a custodian. We want to make sure that Custody is honored.

We want to make sure that we're not just throwing

it away because clearly Celsius didn't know how to do it correctly.

THE COURT: Well, let me ask. Mr. Koenig, the relief that the Debtor was seeking in its separate motion was to return to account holders if anything if Mr. Vejseli deposited crypto into a Custody account, there's no issue about who owns it. And the Debtors' motion is to return that money to people like Mr. Vejseli, correct?

MR. KOENIG: Your Honor, Chris Koenig. That's correct. And the reason is the preference claim has to involve a transfer of the Debtors' interest and property --

THE COURT: And it never had an interest in the property, it's not a preference.

MR. KOENIG: That's exactly right, Your Honor.

THE COURT: So the Debtor is seeking at least that much of the relief that you're asking for, Mr. Vejseli, is to return to account holders who deposited directly into Custody --

MR. KOENIG: Pure Custody.

THE COURT: -- because you retain title to it, assuming that -- I don't have the facts of your specific case, but under the relief that the Debtor is seeking, that's on the calendar as well, you would get that money back. The issue is where funds were transferred from Earn to Custody within 90 days of the bankruptcy petition, where

there is this preference, avoidable preference issue.

MR. KOENIG: Right. And there, likewise Your Honor, there's another wrinkle of the threshold in order to be an avoidance preference --

THE COURT: Yes, it has to be above the 7,500 --

MR. KOENIG: Correct.

THE COURT: Okay.

MR. VEJSELI: If I may --

THE COURT: -- he's an accredited investor. It's above 7,500, I --

MR. VEJSELI: Yeah. If I may, Your Honor, they're also not looking to do that because I have an active loan which is collateralized like to (audio drops).

THE COURT: We're not dealing with that today, Mr. Vejseli. I can't -- okay. All right. Deanna, additional?

CLERK: All right, two more participants. Gregory Kieser is next.

THE COURT: Okay. Mr. Kieser?

MR. KIESER: Hello, Your Honor. Can you hear me?

THE COURT: yes, I can. Go ahead.

MR. KIESER: My name is Greg Kieser and I'm a creditor with primarily loans, but I have money in Earn now and I'm primarily going to give a brief overview of loans with respect to loans that were liquidated and those funds were transferred into Earn when it is more than likely those

-- that when they were liquidated, the excess collateral should have gone into Custody. So I'm not sure you're aware, but during -- after the pause, there were lots of liquidations of loans based on having reached the -- an LTV of 80 percent.

There's a whole group of us. I'm on a steering committee representing hundreds of people who believe that their loans were unfairly liquidated. That's another issue to be addressed at a later time, but what I would like to bring to your attention today is that much of the funds -- so when alone gets liquidated, the excess collateral has to go somewhere and it got dumped into Earn. And I believe that was inappropriate and there are hundreds of other people who believe that was inappropriate. So I deposed Oren Blonstein a couple of weeks ago and asked him about this question in particular, and what he -- the point he made was that -- I'm waiting. Is that a siren on your side?

THE COURT: It is. It's out on the street. Go ahead.

MR. KIESER: Okay. Yeah, so the point he made was that wherever the money came from to form the loan is where the money would go after a liquidation event happened. But the problem with that rationale is that in order to open a loan, we had to transfer it into Earn, even if we had no intention of going into an Earn account. So --

THE COURT: Not after the Custody accounts were set up. I don't think that's correct.

MR. KIESER: Yeah, I mean, that was a point that Blonstein made is that -- and that's where my excess collateral went and there's a whole other --

THE COURT: Mr. Kieser, let -- I'm only interrupting because --

MR. KIESER: Sure.

THE COURT: -- that's not an issue that's going to get resolved today.

MR. KIESER: Okay.

THE COURT: All right.

MR. KIESER: Yep. That's all I have. Thanks.

THE COURT: Thank you, Mr. Kieser. Deanna, who's next?

CLERK: Michael Yankoski.

MR. YANKOSKI: Yes, good morning. Can you hear me?

THE COURT: Okay. Yes, go ahead, Mr. Yankoski.

MR. YANKOSKI: Yes, hello, Judge. Good morning. My name is Dr. Michael Yankoski. I am an unsecured pro se creditor, and unaccredited creditor of Celsius. Thank you for hearing me this morning. I wanted to bring to the Court's attention and Judge, I believe you're already aware of this, but the distinction between the Earn and Custody

accounts was introduced by the Debtor in April of 2022, but my understanding is that the distinction between Earn and Custody was introduced within the 90 days of the Debtors filing for bankruptcy.

And although you pointed out earlier in an earlier statement this morning, Your Honor, that it was the option of the customers to transfer assets from Earn to Custody, the fact that -- the distinction between Earn and Custody was introduced within 90 days of the filing of bankruptcy means that anyone who chose to move from Earn to Custody is subject to preference actions. So in a sense, although it was the responsibility of the customer to do so, to transfer between Earn and Custody, having done so by the structure of the Debtors' distinction between the accounts, those customers are subject or potentially subject to preference actions and to clawbacks.

So I know you're already aware of that. I believe you mentioned that at one of the hearings several weeks ago and sort of pointed out to the Kirkland and Ellis counsel how curious it was that the Earn and Custody distinction was introduced within the 90-day period, but I just want to bring it to your attention again today because there's significant emphasis being put on the distinction between Earn and Custody, but it seems to me as someone who moved from Earn to Custody within the 90 days that I have

significant concerns about the way that was structured and the potential exposure to preference actions, even when I was doing exactly what I was allowed to do as a client and as a customer of Custody. Thank you, Your Honor.

THE COURT: Okay. I guess what I would respond now, I'm keenly aware of the issues that you're raising. I think everybody here is. So under the schedule, the stipulated schedule, if we move to phase two, there are provisions in the agreement about how all of this would unfold before me, and so I think the -- there's the opportunity for taking of depositions of some number of the potential preference claimants.

The issue about preference is not entirely straightforward. There are potential defenses that would have to be addressed by the Court. That's not being done today. But you're -- I'm keenly aware of everything you've said and I have been for quite some time. You refer to things that I've said before. I mean, it's -- yes, you know, the 90-day look back period is in the statute and there are consequences that flow from it.

This is not the first case where this kind of issue has come up or something here, 89 days before. You know, if it was 91 days, it would be an entirely different situation. But we're at 89 days. I deal with the facts as they are. So -- but I understand the point you raised, Mr.

Yankoski.

Deanna, is there anybody else?

CLERK: Yes.

MR. YANKOSKI: Thank you, Your Honor.

CLERK: Two more parties, John Bazolist is next. My apologies if I mispronounce your name.

MR. BAZOLIST: You pronounced that correctly, and I thank you for the time, Your Honor. I actually just raised my hand based off that last question, just to add a little bit of further clarification because there are some edge cases. So me, for example, when I signed up for my account, there was no previous Custody account at the time. So for example, I signed up in March of 2022. I moved funds over to take out a loan against my collateral, which means I had to go into Earn because Earn was the only account at the time.

In early June, I started to be a little bit worried about the market, so I repaid my collateral and moved my funds back from Earn to Custody. And so basically what that means is my funds were never in Earn for more than a fraction of a minute. But because of the way this account was set up, I'm technically subject to a preferential claim even though I was a net contributor to Celsius by interest and never actually received interest from them. So it sounds like you're aware of these issues but I just wanted

to kind of paint the full picture for you there.

THE COURT: Yes, I'm aware of these issues. It can get complicated, obviously, whether there are others in precisely the same circumstance as you, I don't know. The issues about the collateral and the loan program, I'm certainly aware of. They're going to have to be resolved. I'm trying as expeditiously as I can to be able to get through these, to get through as many issues as soon as possible. So I'm not aware of your particular factual circumstances, but it's an example of issues that I was aware of, okay.

MR. BAZOLIST: Yeah --

THE COURT: So it's not going to get -- it's not going to get resolved with what I'm being asked to do now. It isn't going to disappear. Okay.

MR. BAZOLIST: Right, and I'm firmly in a Custody account now. It's just this whole concept of tainted funds if you've ever touched the Earn program I think is what a lot of people are having an issue with.

THE COURT: Sure. Okay. Thanks very much. Deanna, who else do we have to hear from?

CLERK: Next is Rob Butryn; is that correct?

MR. BUTRYN: That's correct. Thank you, Your Honor. I'm a accredited investor. I've been involved with Celsius since 2019. I was mainly in the Earn Program, but I

did move a lot of funds into -- actually transferred all my funds almost off the account just before the freeze. Tried to get the remaining out just before the freeze actually, day before the freeze, and I was told I had to wait 48 hours to establish a new wallet address for them which they knew which wallet it came from. They just wanted to have that time of reference for security. So in that timeframe, I moved it to Custody.

Now, a previous person from the audience spoke about the ledger system and how wallets are, you know, in the cryptocurrency space looked at and, you know, I manage many wallets. I'm the manager of several trusts with my family, but this is a different instance, Your Honor, where a company was holding our funds. The only wallet we were aware of was the wallet we saw on our app or our screen. I don't think we could look at a ledger system as far as where the assets were held. We went by what we agreed with in the terms of use when we said to move them. Thank you, Your Honor.

THE COURT: Okay. Deanna, next?

CLERK: I don't see any additional raised hands, Judge.

THE COURT: Okay. Is there any response from -- reply on this issue from counsel in the courtroom?

CLERK: Sorry, Judge. Simon Dixon just raised his

hand.

THE COURT: All right, please go ahead.

MR. DIXON: Hi, Simon Dixon, creditor. Just wanted to bring to the attention that the option for using Custody wasn't available for any international clients. So it was the only option available for U.S. customers. So we were never presented with that option, just for the record.

THE COURT: Okay, thank you. All right, anybody in the courtroom wish to reply? All right. Let's move on to the Withhold.

MR. COLODNY: Your Honor, Aaron Colodny for the Official Creditors Committee. I don't have a reply, but I just wanted to clarify my previous comments.

THE COURT: Sure.

MR. COLODNY: If you look at Docket No. 1411, which is the examiner's report, PDF Page 213 to 214, it has the amounts in Custody wallets as of the petition date.

THE COURT: What does it show?

MR. COLODNY: It shows --

THE COURT: Somewhere I have the examiner's report.

MR. COLODNY: So it shows --

THE COURT: Hold on a second. I really did -- which page?

MR. COLODNY: It's PDF Page 214. It's in the

exhibits, Your Honor. Looks like --

THE COURT: Oh, I don't --

MR. COLODNY: -- short a copy.

THE COURT: Go ahead and tell me what it shows.

MR. COLODNY: So it shows $182,934,763.78 -- and that's U.S. dollars -- worth of assets in the Custody wallets as of the petition date. The difference equals that 200 approximate number I gave you before.

THE COURT: Thanks very much, Mr. Colodny.

MR. COLODNY: Thank you.

THE COURT: I appreciate it. All right, let's move on to Withhold, then. Ms. Kovsky.

MS. KOVSKY-APAP: Good morning, Your Honor. Deb Kovsky, Troutman Pepper on behalf of the Withhold account holders. If Your Honor will indulge me for a few minutes, I think it's important to give a little bit of background and context on the Withhold group members' position, how we got here, and why legally we should be treated the same as Custody.

Because Your Honor's asked this of the Custody account holders, I will say that the size of the Withhold accounts across the board, across all nine prohibited states, not just the Withhold group, is actually smaller than the entirety of the 6 percent of Custody assets that are in question between the parties. I believe it's about

$15 million.

So how did we get here? As Your Honor previously stated, once the Custody Program was launched by Celsius, the Debtors changed the architecture of their platform. So if you were a nonaccredited investor in the United States, you could no longer transfer your digital assets from Earn to an external wallet. You have to go first through a default account.

From the default account, you could then initiate a transfer to a whitelisted external wallet. In most states, the default account was Custody. In the nine prohibited states where the Debtors were not permitted because they lacked the necessary licenses to Custody coins on behalf of customers, it was the Withhold account which basically served the same sort of central way station or lobby function as the Custody accounts.

THE COURT: So let me ask you. There was no withhold wallet; do you agree with that?

MS. KOVSKY-APAP: I do agree with that, Your Honor.

THE COURT: So we're talking about ledger entries?

MS. KOVSKY-APAP: We are, Your Honor.

THE COURT: Okay.

MS. KOVSKY-APAP: And just like Mr. Ortiz and Mr. Koenig, the Withhold Group believes that it's the ledger

entries, it's the contractual relationship as reflected on Celsius' ledger --

THE COURT: Well, when you say the contractual relationship, you can educate me if I've got this wrong, but this is what I've sort of struggled with, with respect to Withhold. There is no -- there are no terms of use that deal with what -- the Ad Hoc Group, the Withhold account holders, the approximately $15 million of people who are in this broader category. Okay. That's correct, right?

MS. KOVSKY-APAP: That is correct, Your Honor.

THE COURT: Okay. So what I have puzzled about is in the absence of a written contract dealing with hold -- with the Withhold issues, what's the construct, the contract construct? How do I determine what are the rules? It is an implied contract? Is it -- I don't even know that -- I mean, there's no -- I can't, I don't have anything pointing to -- there was an oral agreement that was reached.

There was -- they had this problem. When I say they, the Debtors. They couldn't provide Custody accounts to people in the nine states. So they created -- I'll call it a fiction, but I mean it -- they had some intent when they did it. There are ledger entries. How do I -- is it a contract claim? What is it?

MS. KOVSKY-APAP: Well, Your Honor, I think it is a contract claim, but I think we need to --

THE COURT: What's the contract?

MS. KOVSKY-APAP: Well, we need to approach it from the opposite direction. Remember, all of the assets that belong to the Withhold Group -- and I'm speaking just for my clients, not for the Withhold accounts as a whole -- but all of them had assets that were originally in the Earn program and then left the Earn --

THE COURT: Well, they're not -- well, maybe your group, but -- so there was a category of, I think there was a category of Withhold before Custody was established. And so if an account holder tried to deposit a species of crypto that Celsius couldn't accept but the transfers happened through blockchain and the stuff came to Celsius, okay, what do they do with it? And that problem existed before the Custody accounts were held, right? Am I right about that?

MS. KOVSKY-APAP: Yes, Your Honor, and in fact, I think that's what the Debtors referred to as pure withhold accounts, coins that either weren't eligible digital assets or once the Custody program launched, coins that were coming in newly deposited on the platform from customers in the prohibited states. And the Debtors' position on those coins, which we agree with, which I think even the Committee doesn't dispute, is that the pure withhold assets are not property of the estate, notwithstanding the fact that there are no contractual terms. Nobody is disputing that the --

nobody says that the lack of contractual terms around those coins somehow makes them property of the estate.

THE COURT: You know, when --

MS. KOVSKY-APAP: So that's --

THE COURT: -- I took a bar exam, I took the New York Bar in 1971, I think. Bailments were still covered on the New York Bar exam in 1971. Fortunately, I don't remember any questions on the exam, but you had to study it. So -- but there's law about bailment. And I guess in the absence of the written contract, I mean the law bailment may still apply. I don't know whether it had to be in writing.

I mean, they received these coins. They weren't eligible coins. I believe that the Debtors and the Committee agree that title never transferred to the Debtor of those coins. There's no issue about tracing because they were coins that came in and couldn't be put into an Earn Program, right?

MS. KOVSKY-APAP: That's my understanding, Your Honor. Although as a practical matter, they went into the aggregated main wallets and were used however they were used, and yet notwithstanding that fact, the Debtors and the Committee and the Withhold group all are in alignment that those pure withhold assets, not property of the estate.

THE COURT: Okay. So what's the legal framework that I -- so there's no contract terms you can -- no written

contract terms you can point to. Is it that you're relying on principles of constructive trust law? What is it that you're -- in the absence of the written contractual terms that you're relying on to establish the rights of each of the respective parties?

MS. KOVSKY-APAP: Your Honor, let me separate this because (audio drops) my clients --

THE COURT: I understand.

MS. KOVSKY-APAP: -- and I can only speak for my clients. With respect to what we'll call the transferred Withhold assets which the Debtors have put in the bucket of in general, the Withhold assets, those are assets that were transferred from the Earn Program. And why is that meaningful? The Debtors and the Committee seem to be taking the position or certainly the Committee is taking the position that the default position is, if you transferred assets onto the platform, then by default you must be granting right and title to those assets --

THE COURT: This is where the Debtor -- they'll correct me if I'm wrong. They sort of flip-flopped between their opening position and their reply.

MS. KOVSKY-APAP: They did indeed, Your Honor, and had I been doing --

THE COURT: Committee says no, no, no, no, no.

MS. KOVSKY-APAP: Had I been going in order with

my presentation, I would have gone through and highlighted how over and over and over again. And Your Honor, the whole reason we're here today, how this all got started, the Debtors filed their, what we've been calling their Custody and Withhold motion, their motion to reopen withdrawals for pure Custody assets and pure Withhold assets. And, great, that's a great start.

It doesn't go far enough though, because the transferred assets should really be released to the customers as well. And so we ended up, you know, in this -- you know, that led to our motion for stay relief which led to the scheduling order, which led to the phase one briefing. But it all ties back to the Debtors' original motion and if you go through that motion again and again, they concede that the Withhold assets are not property of the estate.

They're saying some of them may be subject to a preference claim, but --

THE COURT: Well, this where they may have flip flopped, okay?

MS. KOVSKY-APAP: They have indeed flip flopped Your Honor.

THE COURT: Okay. Do you agree with respect to your -- the withhold that you're -- not the pure Withhold, the Withhold that you're talking about, title to the assets

when in the Earn Program were with the Debtors?

MS. KOVSKY-APAP: I agree that that is what the terms of use say that that's the contractual provision that granted Celsius right and titled to the assets. Celsius didn't magically acquire right and titled in a vacuum, absent contractual terms.

THE COURT: No, but I guess the point is that when your clients deposited crypto with the Debtors, title to the crypto, those crypto assets because -- went into Earn accounts, title passed to the Debtors. And then the issue is, well, when they wanted to move out of the Earn accounts, where did title go?

MS. KOVSKY-APAP: Exactly, Your Honor, and to determine that --

THE COURT: that's what I -- where do I go to determine that/

MS. KOVSKY-APAP: We go to Sections 4(d) and 13 of the Terms of Use.

THE COURT: So let's go there and point that out to me specifically.

MS. KOVSKY-APAP: All right. So Section 4(d), and we have to --

THE COURT: Let me get to it. Okay.

MS. KOVSKY-APAP: Sure. And it's page --

THE COURT: I'm there.

MS. KOVSKY-APAP: -- five -- okay. For the record, 538 of 1126 pages in Docket No. 393.

THE COURT: Right.

MS. KOVSKY-APAP: And so what it says, if you go to the bottom of the page. "If our Earn service is available to you, upon your election, you will lend your eligible digital assets to Celsius and grand Celsius all rights and title to such digital assets for Celsius to use in its sole discretion while using the Earn service."

That's a limitation on the contractual --

THE COURT: You're focusing on the last words, while used in the Earn service. And when your clients say move it and they're no longer in the Earn service, then we have to ask the question, well, where'd title go.

MS. KOVSKY-APAP: Exactly, Your Honor. And if the grant of title is by its expressed terms limited in time to the period that they were using the Earn service, I think that has to be the answer because they -- Celsius doesn't acquire more than what the customers grant them. And the same thing if you look at Section 13 of the terms of use, consent to Celsius --

THE COURT: Let me switch --

MS. KOVSKY-APAP: Sure.

THE COURT: Go ahead.

MS. KOVSKY-APAP: Consent to --

THE COURT: I'm on 554; are you on the same page?

MS. KOVSKY-APAP: Yes, Page 554 of 1126, still in Docket No. 393. Section 13 says, "In consideration for the rewards payable to you on the eligible digital assets using the Earn service for us entering into any loan agreement" -- not really relevant here -- "and the use of our services, you grant Celsius, subject to applicable law and for the duration of the period during which you elect to utilize" --

THE COURT: Okay.

MS. KOVSKY-APAP: -- "the eligible digital assets in the Earn service" -- et cetera, et cetera -- "all right and title to such eligible digital assets." It specifically says that you are only granting your consent for the duration of this period.

THE COURT: So your argument is that while the words of the term -- Version 8 of the terms of use do not state what happens to title when the stuff is moved out of Earn. You agree with me, they don't -- it doesn't specifically -- there are no words in the Version 8 that deal with the circumstance you're talking about. The people elected, I want out of Earn, I'm no longer receiving rewards, and you're saying that the language going back earlier, the language only so long as it's in the Earn Program, you're saying the negative implication of that is title passes back to the Withhold people?

MS. KOVSKY-APAP: Essentially, Your Honor. I think it's a little bit more than a negative implication because the grants of right and title in the first instance was expressly limited and Celsius couldn't get more of a grant of title than the customer granted to it. You know, the Debtors said, oh well this is just a negative implication, so we can just read it out of the contract.

THE COURT: But I'm not sure. I don't necessarily agree with reading it out of the contract, but there are no express words that say, that deal with title after it comes out of the Earn. Right?

MS. KOVSKY-APAP: Your Honor, I disagree. I believe that the grant of title being limited to the duration of a specific period cannot extend beyond that period. There's no express language in the contract saying that by the way, once you're no longer using the Earn service, despite the fact it says only for this duration, Celsius will still get to retain right and title. There's no express terms there and the question is really, who are we going to be construing this contract against and who are we construing it in favor of?

This is a contract of adhesion. This is a take it or leave it clickwrap, you know, click a button contract that could not be negotiated or modified by the customers, and Celsius wants this contract to be construed in its favor

to say, well, you know, maybe there's an ambiguity here that it doesn't say expressly that right and titled reverts. It does say expressly right and title is granted for this duration --

THE COURT: Right.

MS. KOVSKY-APAP: But Judge, construe this in favor of Celsius and allow Celsius to retain right and title beyond the express terms of the grant? That is absolutely contract to black letter law --

THE COURT: That is --

MS. KOVSKY-APAP: I'm sorry, absolutely contrary to black letter law. A contract --

THE COURT: Just humor me. Point me to the black letter law that you say it's contrary to.

MS. KOVSKY-APAP: Give me one second, Your Honor.

THE COURT: Fine. I have your brief here, somewhere.

MS. KOVSKY-APAP: It is in our brief.

THE COURT: Yeah, I'm sure it is. So --

MS. KOVSKY-APAP: I should have marked the page.

THE COURT: Is this your phase one response brief or the earlier?

MS. KOVSKY-APAP: I believe it was in our response brief.

THE COURT: Okay. I've got that right in front of

me.

MS. KOVSKY-APAP: So, we've got Westchester Resco --

THE COURT: Tell me the page.

MS. KOVSKY-APAP: Page 9 of 24.

THE COURT: Okay.

MS. KOVSKY-APAP: Paragraph 7.

THE COURT: I must have the wrong briefing.

MS. KOVSKY-APAP: It's Docket 1573.

THE COURT: Hang on. See if I have -- okay, I'm at Page 9. Which paragraph?

MS. KOVSKY-APAP: Paragraph 7.

THE COURT: Okay, go ahead. I have it in front of me. That wasn't the same ECF docket number you gave me.

MS. KOVSKY-APAP: The docket number at the top of my page is 1573.

THE COURT: Okay. It is. Go ahead. I've got it -- have it on paper and I have it open on the screen. Just -- forgive me.

MS. KOVSKY-APAP: Not a problem at all, Your Honor, and --

THE COURT: Paragraph 7 on Page 5.

MS. KOVSKY-APAP: I have -- I'm sorry, Page 5 of the document, page 9 of 24 of the PDF. And in answer to your question, the -- some of the cases that set forth the

fairly uncontroversial principle that contracts get construed against the drafter, we have Westchester Resco Co LP v. New England Reinsurance Corp, 818 F.2d 2, and that's second -- .

THE COURT: I have -- now I've got the cites open in front of me. So you're relying on these, the cases that you've cited in Paragraph 7 of this briefing?

MS. KOVSKY-APAP: Correct, Your Honor, and this is just a representative sampling --

THE COURT: Sure.

MS. KOVSKY-APAP: -- of cases. It's a fairly, as I said, I think a fairly noncontroversial principle, although in application here, there seems to be quite a lot of disagreement between the parties and Celsius and the Committee seem to be advocating for a construction of the Earn terms of use in a way that is materially detrimental to the customers and in favor of Celsius.

THE COURT: Okay.

MS. KOVSKY-APAP: So -- I'm sorry --

THE COURT: You're just -- but I guess the point is, the legal principle that you're relying on in support of your argument is that ambiguity should be construed against Celsius.

MS. KOVSKY-APAP: Our first point is that we think it's not ambiguous, that it's clear that the term of the

grant was time limited but in the event the Court does find that there is an ambiguity there, it must be construed against Celsius and in favor of the customers.

THE COURT: It was -- the specific grant appears to be time limited, but where it went after the time expired is not stated clearly.

MS. KOVSKY-APAP: That's correct. It could have gone anywhere. It could have gone to another service where the customers regranted title to Celsius.

THE COURT: Right. I just want to be sure I've got your -- okay.

MS. KOVSKY-APAP: Yes. All right. So have I fully answered Your Honor's question --

THE COURT: You did.

MS. KOVSKY-APAP: -- about the contractual --

THE COURT: Absolutely.

MS. KOVSKY-APAP: All right.

THE COURT: I don't know if I agree, but -- I haven't decided one way or the other, but I understand your point.

MS. KOVSKY-APAP: Understood, Your Honor. Thank you. Then with respect to, so where did they go, they went to his no man's land, this holding place that the Debtors have called Withhold. It's a separate account on the system. It's separately tracked --

THE COURT: Separate --

MS. KOVSKY-APAP: -- the ledger.

THE COURT: -- the ledger. It was transferred on the ledger.

MS. KOVSKY-APAP: Yes, it was, Your Honor.

THE COURT: Transferred from Earn to -- did they call it Withhold on the ledger?

MS. KOVSKY-APAP: I don't know if they called it Withhold on the ledger. It certainly appeared that way in the app.

THE COURT: Withhold?

MS. KOVSKY-APAP: Withhold.

THE COURT: Okay.

MS. KOVSKY-APAP: And I know that the Debtors have variously called it withheld or withhold, but it appears as Withhold account --

THE COURT: Okay.

MS. KOVSKY-APAP: -- if you go on your phone, and --

THE COURT: Sure.

MS. KOVSKY-APAP: -- go into the app. So I guess part of the question is, how do we treat this no man's land of Withhold. And one of the things I think we need to look to is what's the Debtors' stated intent. How did the Debtor think about this Withhold account that it created and that

as I said, how we got here, why we're in Court today, it all started with the Debtors' initial Custody and Withhold motion. And that's inextricably tied to the issues of ownership that we're discussing here. So I'd like to --

THE COURT: But you would agree, I take it, if ownership transferred back to your clients, then we got to deal with the preference issues.

MS. KOVSKY-APAP: Yes, Your Honor. I do agree, and in fact, that's -- it's a little bit of an odd position that the Debtors are taking now because they were so clear in their Custody and Withhold motion that look, none of these are property of the estate, but if they transferred --

THE COURT: I'm not sure it was quite as clear as you just said. They -- I don't have the brief, the first briefs. I sort of remember when this issue came up in Court. They acknowledged that could be the result, but I'm not sure that they committed -- I don't think there was a concession that they could be bound to. What -- go ahead.

MS. KOVSKY-APAP: Well, if you look at Paragraph 30 of their Custody and Withhold motion, and if we treat these as judicial admissions as I think they are, the Debtor said that the Withhold assets, which by the way they define, they expressly define in their motion that the transferred Withhold assets are included in this defined term Withhold assets.

And what they say at Paragraph 30 is with respect to the Withhold assets, the Debtors have never claimed or acquired an equitable interest in the cryptocurrency stored in Withhold accounts. Thus Custody and Withhold assets are held by the Debtors on behalf of customers and are not property of the Debtors' estate.

But I think even more meaningfully specifically, with respect to the transferred Withhold assets, the argument that they're making that they have -- and they've said this flat out -- we have a prima facie claim for a preference against these assets. Why? Because they said that each transfer from the Earn Program to a Withhold account was -- and I'm going to quote them here -- "made to or for the benefit of a creditor on account of an antecedent debt, i.e., extinguishing the Debtors' contractual obligations to return the cryptocurrency to the customers" --

THE COURT: That was before they changed their position in --

MS. KOVSKY-APAP: -- "pursuant to the latest terms of use." Yes, that was before they changed their position, but this is -- they admitted their intent at this point and they're still claiming that they have a prima facie case for a preference. Your Honor, if there was no transfer --

THE COURT: Only -- no. They only have a prima

facie case for preference if title was transferred back to your clients.

MS. KOVSKY-APAP: And they have asserted that they do. I'm not saying -- I'm not saying that Your Honor has to accept their assertion. I'm saying that if we want to understand what the Debtors' intent was with respect to these Withhold accounts, there's no better evidence to look to than their own statement. You know, if the transfer from Earn to Withhold extinguished their contractual obligation to return assets, that's about as clear a statement of intent as you can get.

THE COURT: Then it throws us (audio drops) problem of tracing.

MS. KOVSKY-APAP: It does, problem of tracing. And in that regard, I have to say I agree wholeheartedly with all of the arguments that Mr. Ortiz was making with respect to the Custody accounts. I think he's absolutely correct. It doesn't -- what happens on the blockchain, where the assets happened to be stored is not the relevant question here. The relevant question is, what's the contractual relationship? What was reflected on the ledger? What did the parties agree to? What was their intent?

THE COURT: Well, if they disregarded the contract and put the assets into an aggregated wallet, that included everybody else's crypto or lots of other people's crypto,

then you're faced with the issue of how do I determine which of that -- what's in that aggregated wallet really is mine, and if there's a shortfall, how is it allocated?

MS. KOVSKY-APAP: Well, here's the thing, Your Honor. If you look at all of the assets that were held on the Debtors' platform, with the exception of a couple of minor coins that are not at issue for any members of my group, there was no shortfall. If you look at all of the assets across the platform that Celsius held with respect to the Custody assets, there was no shortfall. The coins are there and the Committee has made the point, oh well, Withhold is asking for special treatment. You know, they think just because they sued first, they should get to the front of the line.

That is absolutely not the case, Your Honor. The issue is that contractually, legally according to the terms of use, title reverted from Celsius back to the owners.

THE COURT: Let's assume I come out the way you just said. Where were those -- on their ledger? Well, first, in wallet, where were the coins held?

MS. KOVSKY-APAP: Based on Oren Bronstein's declaration, coins that were associated with the Withhold accounts were held in main aggregator wallets.

THE COURT: Okay. And what about on the ledger? Where -- what's reflected on the ledger about who owned the

assets in the aggregated wallet?

MS. KOVSKY-APAP: Your Honor, I don't think the ledger speaks to ownership interests.

THE COURT: Well, is there any designation in the ledger for the aggregated -- I assume there's a ledger for it?

MS. KOVSKY-APAP: I believe it's -- and I will defer to Debtors' counsel if I get this wrong. My understanding is there's one big ledger that tracks everything and it will show what coins are allocated to borrow, what coins are allocated to Earn, what coins are allocated to Withhold, to Custody. And it's all one big database.

THE COURT: Okay.

MS. KOVSKY-APAP: At least that is my very layman's lawyer understanding.

THE COURT: So you believe that -- and I don't know if I have an exhibit that shows this -- that there's an accurate accounting in Celsius' ledger about what crypto coins of various species or types are Celsius' property, which are Withhold, which are Custody?

MS. KOVSKY-APAP: Well, again, I don't know that the ledger speaks to who owns what property, but I do believe there's a -- I have no reason to question the accuracy of the ledger when it says there's this many coins

associated with Custody, this many coins associated with hold, this many with Earn. I'm basing that in part on the fact that I know customers -- and this is attached to -- in declarations attached to our initial filing -- they're able to download CSV files to show their transaction history. My understanding is that those came directly from Celsius' ledger and they appear to be accurate.

THE COURT: Okay. All right.

MS. KOVSKY-APAP: One point that I think is important to clarify, so the Debtors and the Committee spent a lot of time focusing in their response briefs on distinguishing between the Custody assets, which everybody agrees -- including the Withhold Group by the way -- and notwithstanding comments we made in our response brief, I don't want to give the impression that we believe Custody assets are property of the estate. We believe they belong to the customers.

But the Debtors and the Committee spent a lot of time trying to distinguish those assets from the Withhold assets. For example, they spent a lot of time focusing on the fact that the Withhold assets were commingled in main wallets, the concern that Your Honor just raised, and those could be deployed across the platform.

Well, so are the Custody assets. The examiner's report makes it clear that when Custody assets were

deposited into what a customer thought was a Custody account, that was a ledger entry. It popped up immediately on the ledger. It was in the app. But the assets themselves went into the main aggregator wallets. They were commingled. They could have been deployed by Celsius. They might have been taken off of the platform altogether by the customer before there was ever any true-up by Celsius of the amounts in the Custody wallet.

And if a depositor transferred from Earn into the Custody account, again, nothing happened on the blockchain. It was a ledger entry. The assets stayed right where they were in the main aggregator wallet and at some point, maybe days later, Celsius would transfer some of the commingled assets from the main wallet to the Custody wallet to try to backstop the Custody assets, but those weren't Custody customers' assets.

They were commingled from the main wallet. They could have come from anyone. They could have come from members of the Withhold Group. And as I said, because of the timing and the delays in true-ups, a Custody customer could transfer from Earn to Custody to an external wallet all before Celsius even performed a single reconciliation or true-up. So if having assets --

THE COURT: That's the problem, isn't it?

MS. KOVSKY-APAP: Well, here's the thing, though.

Everybody agrees though, that Custody assets belong to Custody. And if having assets in the comingled main wallets don't make Custody assets property of the estate, that shouldn't make Withhold assets property of the estate either. Another thing that the Committee points out is that when a customer transferred assets from Earn to Withhold, no coins immediately moved from one wallet to another. It was a block -- it was, nothing happened on the blockchain. It was just a ledger entry.

Okay, well, you know, what was true of Withhold is true of Custody as well. The fact that Custody customers were able to move their assets from one legal status under Earn to a different legal status under Custody by pushing a button and making a ledger entry without any movement on the blockchain, if they could do that, then Withhold could do that, too.

All right. So then the Committee says, well, the Withhold account holders were only entitled to get back the same type and amount of assets they deposited, not the actual coins. It wasn't 100 percent clear to me, but that appeared to be an argument against Withhold assets belonging to the Withhold customers.

THE COURT: That was true for all customers, period.

MS. KOVSKY-APAP: Exactly. That was true for all

customers. So that's not a valid reason to --

THE COURT: Earn account holders, they're -- they just had to get in-kind. If they wanted to withdraw, they got in-kind distributions of Bitcoin or whatever that that they deposited.

MS. KOVSKY-APAP: Exactly. The same with Custody. The same as with Withhold. So that fact doesn't argue in favor of Custody being property of the estate, but not Withhold or -- I said that backwards. That doesn't mean that Custody is not property of the estate but Withhold is. That was the point I was trying to make.

If customers wanted to withdraw assets to an external wallet, a Custody customer hits the button to do a transfer to an external wallet. Nothing comes out of the Custody wallet. The examiner's report, the Blonstein declaration make it clear that those withdrawals came out of a frictional wallet that was pulling from the aggregated main wallet, same as Withhold.

Well, if it was good enough for Custody and Custody is not property of the estate, the same should be true of Withhold. At the end of the day, the only real difference between Custody and Withhold is that the Debtors did make a somewhat sloppy, somewhat imperfect attempt to maintain a liquidity reserve to backstop Custody.

THE COURT: When I look at the universe of Earn,

Custody, Withhold, do you agree there is a shortfall for at least some of the coins that were supposedly being held by Celsius?

MS. KOVSKY-APAP: I agree that if you look at everything solely in the aggregate without making any distinctions between coins that are still on loan to Celsius and subject to a grant of right and title versus coins that have legally already been returned to the customers, then yes, that's a true statement.

THE COURT: All right. And how's -- if I accept your argument, how does the Court order relief recognizing that there -- there isn't a shortfall in every category of crypto. There are -- there is a shortfall in some, right?

MS. KOVSKY-APAP: Your Honor, I haven't looked at the shortfalls across the board. I've only looked at the Withhold assets and there are, I believe, five coins with respect to which there is a shortfall with respect --

THE COURT: How does the Court -- let's just deal with that, okay, so you say five coins is a shortfall. How is the Court in your view supposed to deal with awarding relief where there is a shortfall in five of the species of coins?

MS. KOVSKY-APAP: Well, every Withhold account customer knows and Celsius knows exactly what coins they held and in what amounts. As long as the balance of those

coins never fell below what those customers are owed, they should be able to recover them, so --

THE COURT: To the disadvantage of Earn account holders.

MS. KOVSKY-APAP: It's not a disadvantage --

THE COURT: It is.

MS. KOVSKY-APAP: -- Your Honor.

THE COURT: Every coin, every piece, you know -- call them dollars. It's just easier for me to do that. Every dollar paid back to Withhold that's coming out of an aggregated wallet is that much less available for pro rata distribution to unsecured creditors; yes or no?

MS. KOVSKY-APAP: Can I give the yes but lawyer answer? Yes --

THE COURT: Yes, then you can go ahead and explain your answer. Go head.

MS. KOVSKY-APAP: Okay. I would say --

THE COURT: I'm not trying to -- I'm not trying to trick you. I just --

MS. KOVSKY-APAP: Yes, but as Your Honor has stated at a number of other hearings, that is the unfortunate result that happens when legally some of those coins are property of the estate and some of them are not.

THE COURT: Well, but the law has developed a variety of ways of allocating a shortfall. And the ways of

allocating the shortfall is not to give your clients 100 percent and diminish what unsecured creditors recover. It doesn't mean you don't get anything but there's a short -- and it may be on a coin-by-coin basis. You say there's only five. I'll accept that for present purposes.

MS. KOVSKY-APAP: And Your Honor, that comes from the stipulation that we --

THE COURT: Yeah, that's fine. I read -- I reread the stipulations this morning. If I accept your position that title transferred back to your clients and there was no separate wallets that the coins went into, they were in an aggregated wallet, and for certain for five of the types of coins, there's not enough to go around; that means allocating a shortfall. And you're -- you seem to be taking the view of we get everything, they suffer the loss. Why is that?

MS. KOVSKY-APAP: Your Honor, I'm not saying we get everything and they suffer the loss. And certainly just to clarify, with respect to the five shortfall coins, none of them, none of my clients are owed or own any of those coins in their Withhold accounts.

THE COURT: Okay, but --

MS. KOVSKY-APAP: Put those to the side.

THE COURT: You're asking me to decide issues. You've got an Ad Hoc Committee. There are specific members

of it, but there are others who aren't part of the Ad Hoc Committee.

MS. KOVSKY-APAP: Correct.

THE COURT: And I'm trying to come up with, okay, here's the -- you know, it may be that if your clients aren't faced with the shortfall, the issue of allocating the shortfall, good for them, you know, assuming I find for you on the other issues. But there are people who would have the coins for which there is a shortfall.

MS. KOVSKY-APAP: Right. So if we're looking at all of the Withhold account holders as a group and we're looking at the shortfall to satisfy their ownership rights in their assets, yes, there is a shortfall as to specific coins, but then we go to the lowest intermediate balance test and that's the unfortunate fact. If you own assets, they're not property of the estate, they're still in the Debtors' possession, the Debtor has wrongfully commingled them, and there's not enough of a particular type of asset to satisfy what you own, then you're not going to get it. so if --

THE COURT: And I can say, the only -- in the last 16 years, I think I've only had one case where this was the issue, was an issue. And you know, the parties argued Colorado law applied in the case and what their way of allocating shortfall. I got law in different states and

mercifully the parties resolved the issue by agreement and there was a 1919 and it got approved. But otherwise, I would have ultimately had to -- I had bench memos analyzing the different ways of allocating the loss. I didn't actually have to decide it. I thought I might have. I went back to look at the cases. I didn't have to decide. The party's resolved it.

So -- but you're again, you say not your clients and I'll ask the Committee and the Debtor how many potential Withhold account holders deposited coins for which there's a shortfall and for which some rules on allocation would have to be made. You say that doesn't involve your specific clients on the Ad Hoc Committee, right?

MS. KOVSKY-APAP: Right. So unfortunately I didn't delve further into --

THE COURT: That's okay.

MS. KOVSKY-APAP: -- to investigate what the numbers would look like or consider how it would be allocated. But yes. So if we're talking about a shortfall within the, all of the interests of the Withhold account holders across the board, there are five types of coins where there would have to be some type of allocation made. With respect to the vast majority, the vast majority of assets, for all Withhold account holders, there are more than ample assets available on the platform to satisfy all

of them in full, because the entire --

THE COURT: We'll see whether Mr. Koenig and Mr. Hershey agree with you or not on that point, but that's --

MS. KOVSKY-APAP: Well, I mean, the entirety of all of the Withhold accounts, as I said before, across all nine prohibited states, it's a de minimis amount compared to the totality of the assets on Celsius' platform. And just to close the loop on Your Honor's question, you know -- about doesn't this, you know, reduce dollar-for-dollar or I guess coin-for-coin, the distributions available to Earn account holders or other account holders. Well, of course it does, but that is the consequence of these not being property of the estate.

THE COURT: Well, it's not a consequence that it's a dollar-for-dollar diminution if the shortfall has to be allocated. You know, some rules for how you determine how that shortfall is resolved. Somebody will educate me about this, but my recollection is it doesn't mean you get everything and they get nothing.

MS. KOVSKY-APAP: Well, we're not suggesting that the Earn account holders get nothing. We're suggesting that out of the billions of dollars of cryptocurrency assets on Celsius' platform, there's about 15 million in that aggregated bucket of assets that don't belong to the estate.

THE COURT: And I guess the point is, if it's

commingled, you don't get the -- the Withhold as an entire group don't -- doesn't get the 15 million and the unsecured creditors suffer the consequences of that. You get all, they get nothing of that 15 million.

MS. KOVSKY-APAP: Well, that --

THE COURT: That's not my understanding of the law. You think it is?

MS. KOVSKY-APAP: Your Honor, I -- my understanding of the law is that if there's a constructive trust around --

THE COURT: You have -- wait, wait, wait -- you've now jumped to a constructive trust?

MS. KOVSKY-APAP: Your Honor, we argued it at length --

THE COURT: I know you did in your brief. But that's not the argument you made to me today. You argued plain meaning of the contract, even though it's silence about what happens to title. You said the negative implication of title, you know, they only had title for as long as it was in an Earn account. You didn't argue -- it's in your brief, no question about it.

MS. KOVSKY-APAP: Well, Your Honor, we get -- we only get to constructive trust -- and perhaps I should have laid this out more chronologically. I was trying to jump in and answer your questions as they came up. But we get to

the constructive trust because these contractually were returned to the ownership of the Withhold account holders.

THE COURT: Just let me -- constructive trust or otherwise, your position is the Withhold account holders for -- with coins for which there is a shortfall, they get everything. The unsecured creditors get -- take the hit completely. That's your position?

MS. KOVSKY-APAP: Our position is --

THE COURT: Yes or no?

MS. KOVSKY-APAP: Yes, Your Honor. That is our position.

THE COURT: You got -- give me a case that says that.

MS. KOVSKY-APAP: You'll give me just a moment, Your Honor.

THE COURT: Constructive trusts are disfavored in bankruptcy, precisely for the reason that recognizing the constructive trust and giving the beneficiaries of a constructive trust 100 percent results in a diminution in the recovery of unsecured creditors. That's one of the reasons there's such a strong bias against -- I won't say never, but that's why Courts are very reluctant to impose a constructive trust that gives everything to the beneficiaries of this constructive trust and takes it dollar-for-dollar away from the unsecured creditors.

So tell me what case you're relying on -- cases.

MS. KOVSKY-APAP: So if you go to our initial brief with -- which is Docket 1289.

THE COURT: Yes. I've got that in front of me.

MS. KOVSKY-APAP: We discussed constructive trust at Page 15 of the brief. It's Page 20 out of 31 of the PDF.

THE COURT: Okay, I'm at 15. Yes. What's the case that you're --

MS. KOVSKY-APAP: So one of the cases that we're relying on is In re Edison Brothers, 243 B.R. 231. It's a Delaware bankruptcy court case from 2000 in which the Court stated, "Courts have concluded that property which a Debtor holds in trust, express or constructive, for another does not become property of the estate when the Debtor files for bankruptcy."

You also have In re Columbia Gas Systems Inc., 997 F.2d 1039 (3d Cir. 1993). Congress clearly intended the exclusion created by Section 541(d) to include not only funds held in express trust, but also funds held in constructive trust.

THE COURT: But I would have to find that you satisfy each and every requirement for there to be a constructive trust. You didn't -- with your contract argument, you didn't rely on that, but you're making a separate argument that if I don't find that the express

contract deals with this, then you rely on a constructive trust and you believe you satisfy each and every element required to establish a constructive trust. Is that your position?

MS. KOVSKY-APAP: Your Honor, let me back up and take those things --

THE COURT: Are you able to answer that?

MS. KOVSKY-APAP: I am able to answer that, but I think I need to back up for a minute because I think we may be talking past each other and conflating two separate issues. We are not saying -- my argument is not that there is an express contract, therefore it's our property or there's an express trust, therefore it's our property.

What I'm saying is there's an express contract. Property rights were returned to the customers, to the account holders, because their grant of right and title terminated. Now what happened then, Celsius misused those customer funds, the customers' property. Celsius commingled the funds. Celsius may -- who knows what Celsius may have done with them.

But that -- there was a misuse of customer property as is unfortunately all too common in the crypto space. And as a result of the misuse of what was customer property, not estate property, that justifies the imposition of a constructive trust.

As far as meeting each and every element of a constructive trust, New York law is clear that all four elements do not have to be met, that these -- this is a flexible test.

THE COURT: Just give me a second. I'm looking for something specifically that I should have here. In all the paper I brought out, it's not in what I brought out. Everybody just stay and -- I just want to grab something off my desk. Don't have to get up or anything, just -- I just want to have -- okay.

What (audio drops) do is we're going to take a 15-minute recess because I want to read a couple of cases as well. So by my watch it's 10 after 11. We'll -- 11:25, we'll come back and we'll continue with this point. Okay? All right. When I come back in, everybody can remain seated. You don't have to get up.

(Recess)

THE COURT: All right, Court's back in session. Ms. Kovsky, go ahead.

MS. KOVSKY-APAP: Your Honor, before we took a break, we were talking about constructive trust and I think I just need to back up for a second again and make sure that I'm clearly explaining what our position is. Our position, the Withhold Group's position is that just like the Custody assets and just like the pure Withhold assets, the

transferred Withhold assets are not property of the estate.

Now, there are different ways of looking at that. The Debtor seems to be taking the position well, if it's not property of the estate, it can be withdrawn from the main aggregated wallets because it's pretty easy to trace those assets. You look --

THE COURT: It's not easy to trace the assets. That's the point. It's not easy to trace the assets. Maybe that you trace value, you can say, well, yeah, the aggregated account holds $100 million or whatever and I'm only asking for 15 million of it. You're not tracing the assets.

MS. KOVSKY-APAP: Well, you're not tracing the specific coin --

THE COURT: That's right. Exactly that point. You can't trace the specific assets. You can say that your clients are entitled in the aggregate to $15 million in value, but you can't trace specific assets.

MS. KOVSKY-APAP: Well, Your Honor, we're not saying they're entitled to $15 million in aggregate value. We're saying that they're entitled to certain coins of certain types and in certain amounts, the same as Custody, the same as pure Withhold, and those absolutely can, you know, as Mr. Ortiz said, it's the same thing with hydrocarbon. You're not going to put your name on a

particular hydrocarbon molecule, but --

THE COURT: I don't think there was a shortfall in the pipeline case that Mr. Ortiz talked about. The question is how much of what's in the pipeline belongs to this predator or this creditor or that creditor. They weren't dealing -- I don't think they were dealing with shortfall. Here, we're dealing with shortfall.

MS. KOVSKY-APAP: Well, Your Honor, it's the same as any case where somebody has a superior claim because they own the assets.

THE COURT: Superior claim until it got comingled. And at that point, I don't think you have a superior claim.

MS. KOVSKY-APAP: Your Honor, we disagree. We think that --

THE COURT: Well, we disagree.

MS. KOVSKY-APAP: -- we have a --

THE COURT: Go on to your next argument.

MS. KOVSKY-APAP: Well, the argument is the constructive trust argument and that's what we were talking about before the break and Your Honor said, well can you meet all four of the elements. My response was, all four of the elements don't have to be met in order to establish a constructive trust.

THE COURT: Well, that's not exactly true. There are some cases that say maybe we won't all cases rigidly

require satisfaction of all four elements of New York law with respect to the existence of a constructive correct.

MS. KOVSKY-APAP: Correct. As Your Honor stated in the Dewey & LeBoeuf case in 2013. Although these factors provide important guideposts, the constructive trust doctrine is equitable in nature and should not be rigidly limited.

THE COURT: Equitable in nature. And is it equitable where assets have been comingled to say that your clients get everything and they take the whole hit; that's the point. Is that equitable? That's contrary to the equality of distribution principle in bankruptcy.

MS. KOVSKY-APAP: Your Honor, it's not contrary to the equality of distribution principle. The customers that are taking the hit have coins that they lent to Celsius that are subject to a grant of right and title to Celsius.

THE COURT: And they don't have --

MS. KOVSKY-APAP: My clients do not.

THE COURT: -- shortfall. You've agreed there's a shortfall.

MS. KOVSKY-APAP: I agree there's a shortfall, but that's the risk that they took. They lent --

THE COURT: That's the risk that who took?

MS. KOVSKY-APAP: The customers in Earn.

THE COURT: It's also a risk that the customers

who think that they have a trust or they think the terms of use, that it belongs to them, it doesn't exist anymore. Okay, then the question is, it was in a commingled account. Do the rules require an allocation of that loss? You say no; we'll see. I have your point.

MS. KOVSKY-APAP: Thank you, Your Honor. And I've been up here for quite a while so I will try to wrap up and I just want to return to one more point about constructive trust, which is the unjust --

THE COURT: No. Go on.

MS. KOVSKY-APAP: All right, just to sum up, the question is, should the Withhold account holders, should the Withhold assets be treated differently from the Earn assets? Should they be treated like the Custody assets? We believe that there is a material distinction between assets that are on loan to Celsius and subject to a contractual grant of title and assets that were already legally returned to the customers and subsequently converted and misused by the Debtors. Because these assets were returned to the customers, they were separately tracked. They were in a different account. They were legally different --

THE COURT: They weren't in a separate account. They were on a separate ledger entry.

MS. KOVSKY-APAP: And that's how Celsius set up its accounts, by ledger entries. They weren't in a separate

wallet. They were in a separate account. Those are two different things, Your Honor. We believe that it would be appropriate and equitable to treat the Withhold assets the same as the Custody assets because legally that's really how they're situated. There's no rational distinction, particularly when you're talking about Withhold -- just Withhold assets, there's no (audio drops). The pure Withhold assets can go back to the customers, but the transferred Withhold assets cannot.

Either way, if it's a Withhold asset, it's not property of the estate. It's no longer on loan to Celsius. Celsius had no contractual right to do anything with these assets. The fact that Celsius misused them should not be to the detriment of --

THE COURT: They lost track of them. That's --

MS. KOVSKY-APAP: Well, no, they tracked the Withhold assets. They know to the, you know, hundredth or thousandth of a piece of Bitcoin exactly how many coins are allocated to the Withhold accounts. And they're -- all of the coins that are necessary to make all of those coin owners whole, to give them back their coins, they're there.

THE COURT: There's not enough in the commingled account to give everyone who had Bitcoin what they believe -- what they're entitled to.

MS. KOVSKY-APAP: There's enough in the commingled

account to give everyone whose assets were legally already returned to them all of the Bitcoin that they're entitled to, whether they're pure Withhold, pure Custody, regular Custody, or regular --

THE COURT: I have your point. Anything else?

MS. KOVSKY-APAP: That's it, Your Honor.

THE COURT: Okay. All right. Let me hear from the Debtor.

MR. KOENIG: Your Honor, again, it's Chris Koenig, Kirkland and Ellis, for the Debtors. We start as we did with Custody with the contractual language because as I noted when we when we were speaking about Custody, every digital asset that is transferred to one user is one less digital asset for everybody else that is general unsecured creditors.

Our position is that Custody is different because Custody has clear language providing that the digital assets remain the property of the customers even while they are in the Custody program. Not so for Withhold. There are several places in the terms of use that we should look at. Ms. Kovsky pointed you to Section 4(d) and she's effectively reading words on the page that are not there.

I thought I heard her concede that the words were not actually on the page and that that she is reading some sort of inference that it was -- the grant of title was

somehow time limited, but I just don't see the words on the page there. But what's more is if Your Honor turns to -- and I think this section will be clearer. Your Honor turns to Section 10 of the Version 8 of the terms of use which is Page 547 of 1126.

THE COURT: I'm there.

MR. KOENIG: And I'm reading down towards the end of the page. It's the sentence that starts with "We may lend."

THE COURT: Yes, go ahead.

MR. KOENIG: "We may lend, sell, pledge, hypothecate, assign, invest, use, comingle, or otherwise dispose of assets and eligible digital assets that are not held in a Custody wallet if available to you to counterparties or hold the eligible digital assets with counterparties and we will use our best commercial and operational efforts to prevent losses," and it continues.

"By transferring digital assets to Celsius or lending eligible digital assets to Celsius while using the Earn service or otherwise using the services, you will not be entitled to any profits or income Celsius may generate from any subsequent use of any digital assets, nor will you be exposed to any losses which Celsius may suffer as a result thereof. You agree and acknowledge that you are exposed to the possibility that Celsius may become unable to

repay its obligations to you in part or in full, in which case, any digital assets in your Celsius account that are not using the Custody service may be at risk of partial or total loss."

So Your Honor, that was a lot of words on the page, but what it boils down to is the Custody service is expressly carved out and is treated differently from other digital assets on the Celsius platform, including Withhold. So not only is Ms. Kovsky reading language into Section 4(d) that isn't there, but her reading is inconsistent with the language in Section 10.

THE COURT: Let me ask, because -- I thought I had marked it. The language Ms. Kovsky was referring to where it basically said that the transfer of title is time limited. Which paragraph?

MR. KOENIG: That's in 4(d), Your Honor. That's on page 538 and there's another section that Ms. Kovsky was referring to. The language is substantially identical.

THE COURT: Okay.

MR. KOENIG: Section 13.

THE COURT: It's the -- on 538, 539 carryover. "If our Earn service is available to you, upon your election you will lend your eligible digital assets to Celsius and Grant Celsius all rights and titled to such digital assets for Celsius to use in its sole discretion while using the

Earn service." And I guess her point was that once somebody moves it out of the service, you no longer have title to it. Why is that wrong?

MR. KOENIG: Your Honor, I believe that the language is -- I think she's reading words into the language that are not there and those words are inconsistent with the language that I just read from Paragraph 10, which is pretty clear, I think, that to the extent there are digital assets -- eligible digital assets, excuse me, that are on Celsius' platform that are not the Custody assets, Celsius -- just flipping back to the language on Pages 547 and 548.

"Celsius may lend, sell, pledge, hypothecate, assign, invest, use, comingle, or otherwise dispose of assets. By transferring digital assets, you will not be entitled to any profits or income. You agree and acknowledge that you are exposed to the possibility that Celsius may be unable to repay the obligations to you in part or in full."

THE COURT: Okay.

MR. KOENIG: And that's exactly the situation that we're in.

THE COURT: Okay. Well, when you say that's exactly the situation that you're in, your position now, which again did seem to change from your opening brief, was that Withhold account holders have no -- received no title

to any of the assets when they came out of our -- that was reflected on a ledger, but that didn't alter Celsius having title.

MR. KOENIG: Your Honor, I agree. It didn't alter Celsius having title. I'd make a distinction. There were pure Withhold assets for which there was never a contractual grant of title. The example you gave earlier, there's a coin that simply wasn't supported on the platform and couldn't be part of your Celsius account, that's different because the customer never conveyed title and the Debtors never accepted that title.

With respect to Withhold assets that were at one in Earn, there was a contractual grant of title in Section 4(d) and elsewhere in the terms of use and the language in 4(d) is silent about what happens when the title is moved to another service.

THE COURT: So this really -- you've got a contract that's silent on Withhold. And are there legal principles by which a Court finds an implied contract or do you have to move directly to the constructive trust arguments? I mean, what -- it clearly, your position is that the four corners of Version 8 of the terms of use do not contractually explain what happens when crypto assets move out of Earn accounts into no man's land of the Withhold.

MR. KOENIG: That's right, Your Honor. What I'd also add is I think, to put a little bit of a finer point on our position, which I admit changed from the first brief to the second brief, these are tough contractual issues. We said in our first brief that we thought it was a close call. And you know, as we continued to review and had the benefit of reading --

THE COURT: Well, you had the benefit of the Committee's position --

MR. KOENIG: And --

THE COURT: -- and changed your mind.

MR. KOENIG: I don't disagree with that, Your Honor.

THE COURT: You still agree it's a close call?

MR. KOENIG: I still agree it's a close call, Your Honor. I still think it's a close call.

THE COURT: So assuming the close call was decided in favor of Withhold, what are the consequences of that?

MR. KOENIG: If by close call was decided in favor of Withhold, that Withhold is property of the customers under the contract? I think in that situation they would be identical to Custody in that they are entitled to the return of their property, subject to the issue we're going to talk about in a minute about whether we can maintain possession and control because of pending preference and other claims.

But I think that, you know, we certainly conceded that Custody assets to the extent they are not property of the estate should be returned to their owners, subject to what we're going to talk about in a minute. And I have the same view on Withhold.

THE COURT: And what about the shortfall that Ms. Kovsky and I were fencing about?

MR. KOENIG: I think that the shortfall, Your Honor --

THE COURT: Is it only five coins that we're talking about?

MR. KOENIG: It's only five coins that we're talking about. The shortfall that we're talking about, I think comes more into play in the constructive trust realm. And as we laid out in our brief, and I'm happy to walk through in more detail, I don't think that Ms. Kovsky has -- I don't think that Ms. Kovsky has addressed the other elements. She said, oh, maybe you don't need all the elements. I don't think that she's met any of the elements.

She suggests that there is a promise, express or implied. What's the promise? There's language that is missing from the agreement. What's the promise? There's an element that's a transfer in reliance on the promise. There's no promise and her own clients' declarations say that they weren't even aware of a Withhold account until

after they transferred. So how could the transfer have been in reliance on a promise about Withhold program that they knew nothing about?

I just don't think that they've met the elements of a constructive trust, and as Your Honor explained, a constructive trust is extraordinary remedy. And as we laid out in our brief, a constructive trust is supposed to be fraud rectifying. And there's no -- I don't believe that there's any allegation of fraud here. I heard Ms. Kovsky say oh, well, in cryptocurrency generally there's, you know, fraud abounds, but that's not what we're talking about.

We're talking about this case and the record before Your Honor. I don't believe that there's any credible allegation of fraud.

THE COURT: So what would be the result if I conclude that Ms. Kovsky is correct in interpreting the contract, okay. So in terms of the ledger, reflected it came out of Earn and into Withhold, but it was comingled. And at least some of the coins, there's a shortfall. What happens then? What are the rules for allocating? Do the Withhold account holders get 100 percent and it diminishes the recovery of unsecured creditors?

MR. KOENIG: I think that to the extent Your Honor rules that the contract provides that Withhold assets are not property of the estate, then that is the outcome.

That's the identical outcome that we believe would be appropriate for Custody. Again, assuming, you know, putting to the side for the moment, you know, that the second issue today.

THE COURT: Okay.

MR. KOENIG: But again, she has to have a contractual argument and we don't believe that that's -- we believe that Withhold is different from Custody --

THE COURT: Step one, you disagree with her that the contract should be interpreted that when Celsius made ledger entries removing assets from Earn and into Withhold that that did not transfer title to the assets.

MR. KOENIG: The ledger entries by themselves do not transfer title. A contractual agreement is needed. That's what differentiates Custody from Withhold because the terms of use are very clear in a variety of different areas that we talked about this morning and that are in our brief, that are clear that the Custody property, the Custody assets remain property of the customers. There is no such language for Withhold.

THE COURT: Okay.

MR. KOENIG: And what's more, so if there isn't clear language, what should the Court look to? And then we have to start to get into extrinsic evidence and what the examiner found was that the Debtors treated the Withhold

assets as the Debtors' property. They -- the Debtors deployed the Withhold assets. It is not as though they kept them separate or kept them safe. It is not as though they tried. It's not as though the Debtors tried to establish a separate Withhold wallet or fire blocks workspace as they did for Custody.

So the Debtors' intent not only in the terms of the contract but in what played out in real life is very different for both Custody and Withhold. The Debtors never -- the Debtors treated the Withhold assets as their property and there wasn't a contractual agreement to the contrary. So simply put, our view is that the Withhold users are effectively the same as every other user that got stuck on the system who tried to withdraw and were unable to get fully off the platform before the pause.

THE COURT: Let me ask specifically on that. People tried to -- account holders tried to withdraw assets from the platform. Some thought they had succeeded only to find out that they hadn't. In terms of Celsius' ledger, how were things recorded in the ledger when Joe Smith put in instructions to withdraw everything that he or she -- you know, that he had in an Earn account? How was that --

MR. KOENIG: From Earn to Withhold you mean, Your Honor?

THE COURT: No. Now I'm talking about Custody

again.

MR. KOENIG: Okay.

THE COURT: Let's put -- I'm just trying -- whether it's Withhold or Custody, I think would -- really the same question.

MR. KOENIG: Right,.

THE COURT: How was -- so when an account holder sought to withdraw assets and got caught in the pause, how was -- how did that all get recorded in the books and records of Celsius?

MR. KOENIG: Your Honor, it depends on -- I hate to say it depends, but it depends on where they were when the pause sort of came down, right? If the user tried to withdraw at the moment of the pause or the moment after the pause, they may have gotten caught in Earn. If a user tried to withdraw all the way off the platform in Earn and got sort of in the way station of Custody or for the users in the nine prohibited states in the way station of Withhold, that transfer would take place on the ledger instantaneously, pursuant to the Debtors' technology, but then it needed to be further withdrawn.

And for the Withhold users, they received an email saying you need to come and get this. You need to tell us where to send this property. We cannot simply send it to you. And so it got stuck there. And so that's why we have

the Withhold users to begin with, but you can track it on the ledger when it moves from Earn to Withhold and why it's stuck there.

THE COURT: So what provision of the terms of use are you relying on that title remain with Celsius until the funds wound up back with -- well, when it went into Custody. We'll deal with that separately. Because you say when it went into Custody, you say title passed.

MR. KOENIG: Yes, Your Honor.

THE COURT: Contract.

MR. KOENIG: Yes.

THE COURT: What about with Withhold?

MR. KOENIG: With Withhold, I'd point you again to Section 10, Section 4(d). I don't read the words into Section 4(d) that Ms. Kovsky does. I think the contract is silent on what happens when it comes out of Earn. I think that I think that Section 10 is clear that it is excluding from title being with Celsius only the Custody assets, not any other assets that are on the Celsius account, and I think that that's very significant.

THE COURT: Would you agree that to the extent that the written words of the contract don't state what the legal status of Withhold assets are, that the Court can't decide the issue based on the four corners of the contract?

MR. KOENIG: By that --

THE COURT: Yesterday, I heard arguments about who owns the Earn assets and it was a question of is the contract clear and unambiguous. Nothing in the contract. Nothing in this contract deals with Withhold.

MR. KOENIG: Your Honor, I think to the extent you find that Section 10 is not talking about Withhold at all, which I think would be, you know, one conclusion that Your Honor could draw, if what you're saying is that there are no words in the contract expressly dealing with Withhold, then I don't see what other alternative Your Honor would have, but to look outside the four corners of the contract. And I think when Your Honor --

THE COURT: I'm just trying to figure out what I can decide and what I can't decide --

MR. KOENIG: Right. Right.

THE COURT: -- on the motion. And I think once Your Honor does look outside the four corners of the contract, the Debtors' intent and use of property is clear as outlined in the examiner's report and Mr. Blonstein's declarations. But I don't need to belabor the point.

THE COURT: Okay.

MR. KOENIG: Just going back to the contractual point for a moment, Ms. Kovsky hasn't pointed to any intent of the Debtors other than the language in 4(d) that I think she's reading into, to -- by the Debtors to relinquish title

to the transferred Withhold assets. I don't think there's any disagreement that title was with the Debtors while it was in Earn. There is no language in the contract that provides that title passed back to --

THE COURT: Except for everybody yesterday --

MR. KOENIG: -- Custody.

THE COURT: All the pro ses yesterday would disagree with that statement, but --

MR. KOENIG: I understand their position, Your Honor. But there's no intent in the language of the contract or intent in the actions of the Debtors to relinquish the title.

Your Honor, I got into the constructive trust argument a little bit. I don't know if you have any additional questions for me on that. I don't want to rehash.

THE COURT: Tell me -- you say you don't believe that the Withhold, the Ad Hoc Committee has established the elements of a constructive trust.

MR. KOENIG: Yes.

THE COURT: Just give me a second.

What I understand the elements of constructive trust in New York law, the party claiming a constructive trust must establish four elements: confidential or fiduciary relationship; two, a promise expressed or implied;

three, a transfer of the subject res made in reliance on that promise; and four, unjust enrichment. You agree with -- those are the four elements?

MR. KOENIG: Yes, Your Honor.

THE COURT: And have the Withhold -- Ad Hoc Committee of Withhold, have they established, one, a confidential or fiduciary relationship?

MR. KOENIG: Your Honor, I don't -- maybe I missed it in their brief. I don't believe they've even alleged it and I don't believe that that -- that even if they had alleged it, that that element has been met because the Debtors and the customers that are arm's length commercial relationship, that's not a confidential or fiduciary relationship. I'd point Your Honor to Ames Department Stores, 274 B.R. 600 and Mid-Island Hospital, 276 F.3d 123.

THE COURT: All right. The second element, a promised express or implied. Have they satisfied that?

MR. KOENIG: They have not, Your Honor. They haven't. They can't point to any language in the contract that could be a promise. I haven't seen any evidence that they -- that these individuals, you know, received any communications from Celsius that would constitute a promise. And as I mentioned earlier, I think that their own declarations say that they weren't even aware of the Withhold accounts until after the transfer was made out of

Earn.

THE COURT: And I guess that would -- you'd also deal with the transfer of the subject res made in reliance on that promise, they didn't know about -- didn't even know about the Withhold accounts.

MR. KOENIG: Yes. Same answer.

THE COURT: What about the unjust enrichment?

MR. KOENIG: I don't think that there's unjust enrichment here. I think unjust enrichment is a high standard to meet. I think that the Debtors clearly communicated to the affected users that they should withdraw the assets off the platform. It's not like the Debtors took any untoward acts to retain this property. These folks, the Withhold users got stuck on the platform like everybody else did. It's not as though the Debtors took any actions that should be unwound because they were unjust in some way. The Debtors were doing their best --

THE COURT: Treat everybody the same.

MR. KOENIG: The Debtors were doing their best to handle the overwhelming amount of withdrawals around the pause and these folks got caught just like everybody else got caught on the system. The only difference is Custody, because Custody has the contract.

THE COURT: If the Court agreed with Ms. Kovsky that the contract should be interpretive, that title was

held by the Debtors only when it was in Earn and it went into this Withhold that's not covered by the contract, and to the extent there is a shortfall and if it's five of the coins, just hypothetically, how would the shortfall be allocated?

MR. KOENIG: Is this in a constructive trust world, Your Honor, or are the coins the property of the Withhold users?

THE COURT: Well, let's take it if it's property of the Withhold users.

MR. KOENIG: I think --

THE COURT: You agree with Ms. Kovsky that then they get it and it's the unsecured creditors who bear the entire --

MR. KOENIG: I do, because that's the position that we've taken with respect to Custody. So to the extent Your Honor finds that the contract provides that it remains the property of the withhold users, then that's what the -- that's what the result should be.

THE COURT: Okay. And I guess if title didn't pass, your view is then you don't even get to this issue of shortfall and just, they're treated just the way all other unsecured creditors --

MR. KOENIG: They're unsecured creditors, just like everybody else who tried to withdraw and failed to get

off the platform, other than Custody.

THE COURT: Okay.

MR. KOENIG: I would just add that the burden is on the Withhold users to demonstrate that it's their property. And I think that the contract -- and I may be flip-flopping again and I apologize -- but just thinking out loud, the contract provided for a clear conveyance of title from the users to Celsius when it was in the Earn program.

It was not -- there was no clear conveyance of title back. I think that the burden is on the Withhold users to demonstrate a clear conveyance of title back. And I don't believe that they have been able to point to any language or action that that leads to that result.

THE COURT: And what is the result if I find the contract ambiguous with respect to relying on Ms. Kovsky's argument about the last clause in 4(d) about basically title for Celsius to use in its sole discretion using the Earn (audio drops). It came out the (audio drops) terms of the ledgers of Celsius, the assets came out of Earn. They no longer earned a reward. They were in this no man's land. Is that an ambiguity? Do I have (audio drops) to be able to resolve this?

MR. KOENIG: Your Honor, I don't think that it's ambiguous. I think the contract is silent. I think silence is different from ambiguity, and again, I'd point to Section

10 which I think is a little bit clearer than Section 14, which is silent. I think Section 10 speaks to this issue a little bit more directly. It doesn't use the word Withhold, but I think it clearly carves out Custody and only Custody. And so all other eligible digital assets, using the defined term, would be, you know, would remain property of Celsius and Celsius would have the right to lend, sell, pledge, rehypothecate, assign, invest, use, et cetera, as set forth in Section 10.

THE COURT: I've got to split back to the definition of eligible digital assets on Page 527 of 1126.

MR. KOENIG: I'm with you, Your Honor.

THE COURT: Is services a defined term? I don't see it listed here.

MR. KOENIG: It's on the prior -- it's before the definitions, Your Honor. It's on Page 521 of 1126.

THE COURT: Okay. Was Withhold a service? I mean, it was on the app.

MR. KOENIG: Your Honor, reading the language, the language in Section 1 that's on Page 521 is extremely broad. It is, "Each user's access to and use of Celsius' products and services as well as our mobile and web based applications, websites, software programs, documentation, tools" -- there's a lot of other words there but -- "provided to you by Celsius directly or indirectly through

our mobile application, or website, or any other online service" --

THE COURT: Was Withhold on the app?

MR. KOENIG: There were Withhold accounts and you could see your balance as a Withhold account. And so Your Honor, I believe that it's within the definition of services and just to correct something that I said on Paragraph 10, I said "eligible digital assets" and I believe that the end of Paragraph 10 actually says "in which case any digital assets," not any eligible digital assets.

I think that's a distinction without a difference given the definitions, but I just wanted to correct --

THE COURT: All right.

MR. KOENIG: -- the record.

THE COURT: Thank you.

MR. KOENIG: That's all I have, Your Honor.

THE COURT: Thank you.

MR. KOENIG: Thank you.

THE COURT: For the Committee?

MS. AMULIC: Good afternoon, Your Honor. Andrea Amulic, White and Case, for the Committee.

So as an initial matter, the Committee does not agree that the terms of use are silent as to when title transfers. Section 11 of the terms of use say that a loan obligation -- I'll give you a second --

THE COURT: Just a second. Let --

MS. AMULIC: Yeah.

THE COURT: Okay, I'm on Section 11. Which language are you referring to?

MS. AMULIC: The language that says a loan obligation terminates upon repayment. So the exact language --

THE COURT: Where is that?

MS. AMULIC: Yep.

THE COURT: This goes on for several pages, so --

MS. AMULIC: So first paragraph, second sentence. "Such repayment will terminate in whole or in part your loan to Celsius."

THE COURT: Okay. And the -- what's the import of that language?

MS. AMULIC: They haven't been repaid. So if the Withhold group had requested to transfer out of Earn through their Withhold account and received the funds in their external wallets, that's repayment. They have not been repaid. That's why they're here.

THE COURT: And essentially your argument based on Section 11 would apply to all Earn account holders that sought to withdraw their assets and because of the pause or whatever was not completed?

MS. AMULIC: Correct, and regardless of where they

live, right, because the only difference between the Withhold Group and other Earn account holders who similarly got stuck during the pause is that the Withhold Group happened to live in one of nine states. So -- and your Court's already denied a creditor's request to lift the stay to recover his assets when he got stuck in a withdrawal attempt. There's no --

THE COURT: (indiscernible).

MS. AMULIC: That's right, yeah. And--

THE COURT: -- opinion on that.

MS. AMULIC: -- there's no difference, there's no meaningful difference between his entitlements to assets he had initially transferred as part of the Earn Program --

THE COURT: Okay.

MS. AMULIC: -- and Withhold Group's assets they had initially transferred as part of the Earn Program.

THE COURT: Okay.

MS. AMULIC: Ms. Kovsky also seems to be asking Your Honor to do quite a bit by way of negative implication and in light of the express terms I've just read, we submit that the title did not transfer to Withhold account holders at the time of clicking to transfer an account balance from Earn to Withhold account.

Would also like to address just kind of a -- maybe a mischaracterization that a lot of folks are operating

under. There are no Withhold assets. There are assets that --

THE COURT: They're comingled assets.

MS. AMULIC: Exactly.

THE COURT: -- account, but --

MS. AMULIC: Exactly. And the Withhold account balances merely track obligations, amounts corresponding to some assets in that pool. And the big difference between Custody -- and I disagree with Ms. Kovsky -- is that Celsius created a space for Custody holders to look to for recoveries. They didn't yet maybe practically have the technology to segregate individual coins, but they said, here's this bucket and then they wrote the terms of use to say, you look to that bucket. Anything in that bucket in the wallet is Custody.

Any -- that's why it doesn't say Custody assets. It says assets in Custody wallets. Celsius did not create a space for the Withhold Group. They knew the balances. They could have, you know, said, well, here's a little bucket for you too and we're actually actively asking you to withdraw. They didn't do that. They treated these assets exactly as their own assets, exactly as Earn assets. And that's relevant, right? Like they saw no distinction between this group and regular Earn account holders.

And just for completeness, to the extent Your

Honor finds that there is no terms of use that governs, it's the conduct of the parties that's relevant.

THE COURT: Conduct of the parties, I can't decide right now. I mean, do you agree with that?

MS. AMULIC: On the --

THE COURT: That's --

MS. AMULIC: -- record?

THE COURT: -- extrinsic evidence.

MS. AMULIC: Correct, but I'm saying if you were to find that the contract was not facially unambiguous, we would look to that and we would look to the conduct of the parties and understanding you can't decide it right now, it clearly shows that Celsius treated these assets as estate property.

I mean, unless Your Honor has -- oh sorry. One more. With respect to the pure Withhold, we do actually dispute that those assets should be returned to the customers. I believe Ms. Kovsky said we didn't. Again, that's a situation in which it's more arguable that a contract does not govern because --

THE COURT: How -- if somebody deposited an XYZ coin that Celsius did not permit to be deposited on its platform, how is it, in your view, that title to that passed to Celsius?

MS. AMULIC: Because Celsius didn't set it aside

or designate it or do any --

THE COURT: -- have no trouble tracing it. They just -- it never went anywhere. I mean, it was in no man's land. It didn't -- you know, your, the unsecured creditors didn't have a claim to that particular species of -- isn't that true?

MS. AMULIC: That -- yes, that makes sense. We don't, however, know what the breakdown is between pure Withhold users that transferred, for example, the Binance coin which wasn't supported versus folks who transferred after April 14th but we're in an unaccredited state. And those, that second category --

THE COURT: What I understand, the pure Withholds to be and that goes back before they created the Custody accounts. People -- some people tried to deposit species of crypto that Celsius did not accept for its platform.

MS. AMULIC: So in the Debtors' initial motion that kicked all of this off, they explained that pure Withhold as we're using it, is yes, that group of people but also people against whom there isn't really a preference issue because they weren't coming from Earn to Withhold. They were coming from external wallet to Withhold and because of the nature of the blockchain, if they were residing in one of the prohibited states and they put in Celsius' wallet address as the recipient on the blockchain,

Celsius can't block it.

Once it's at Celsius, they can say oh no, that person is in a prohibited state. This must be associated with a withholding.

THE COURT: Celsius never treated -- I don't know what the volume of it is. Does anybody know what the --

MS. AMULIC: The pure Withhold is around 700,000. I don't know how many of those are the unaccepted coins versus the pure transfers.

THE COURT: Okay. Go ahead.

MS. AMULIC: And again, with respect to that second group which is the transfers external to Celsius but marked Withhold, Celsius again commingled those assets, treated them as Celsius assets, used them, deployed them, didn't segregate them. It's the same --

THE COURT: It had to be of a crypto type that Celsius would accept.

MS. AMULIC: In that case, yes. So there's two, right. There is the kind that Celsius can accept, there's the kind that they can, and in that second case if I were living in, I think Louisiana for example, and I transfer -- you know, I go on the blockchain and I, you know write Celsius as the recipient, that's done, the transfer is done. And so Celsius can't stop it. So now they're holding this asset which they can't really hold, so they're saying, okay

this person has a withhold account balance, put the asset into the aggregator, use it, do whatever you want with it.

THE COURT: I'm sorry, I missed that last?

MS. AMULIC: Use -- they can use it.

THE COURT: Did they?

MS. AMULIC: Yeah. They comingled and --

THE COURT: Well, did they use -- I mean, what did they do? They've got -- did they deploy the assets that were not permitted to be -- that they didn't accept on their platform?

MS. AMULIC: The assets they didn't accept, for example, the Binance coin, no, I don't think so actually, rather.

THE COURT: Okay.

MS. AMULIC: The assets that were the kind they could accept but came from a user in a prohibited state, yes.

THE COURT: Sure.

MS. AMULIC: They aggregated those with --

THE COURT: Just -- the Binance.

MS. AMULIC: Yeah, that --

THE COURT: They didn't deploy Binance.

MS. AMULIC: I will defer to the Debtors on that, but that's certainly not the group I'm trying to address.

THE COURT: Okay.

MS. AMULIC: And if Your Honor has no more questions, that's all I have prepared.

THE COURT: Okay. Let me see whether anyone wants to respond to the Committee or the Debtors with -- Ms. Kovsky, do you want to respond?

MS. AMULIC: Thank you.

MS. KOVSKY-APAP: Okay. Deb Kovsky for the Ad Hoc Withhold Group again. First, I want to address something that Mr. Koenig said repeatedly, that I was reading words that are not on the page and Your Honor, I'm very puzzled by that because I'm pretty sure I read them verbatim off of the page.

THE COURT: Ms. Kovsky, you read the words that were on the page.

MS. KOVSKY-APAP: All right. I just wanted to make sure that --

THE COURT: I think their point is that those words don't do what you say they do. You read the words correctly.

MS. KOVSKY-APAP: Thank you, Your Honor. Just wanted to make sure that that point was clear.

THE COURT: Certainly.

MS. KOVSKY-APAP: Then I think the Debtors, again, are making the same argument with respect to the terms of use around Earn that they were making previously that

they're saying these words are on the page, which we all agree they're actually on the page. They say they don't mean what I say they mean. If there's any ambiguity in how those words are to be interpreted, that ambiguity has to fall in favor of the customers.

THE COURT: No. Then extrinsic evidence becomes relevant to the Court's interpretation. It may be at the end of the day, the Court decides in your favor, but I don't understand the rule to be that you look at the language of the contract. If the Court determines it's ambiguous, I decide for you. At that point, I may have to take extrinsic evidence and that extrinsic evidence may be the treatment that if there was a consistent treatment that Celsius applied to the language. Is there something you think that says, don't take extrinsic evidence, just decide for me?

MS. KOVSKY-APAP: No, Your Honor, not at all. My point was more that to the extent that there is ambiguous language and it could be interpreted in a couple of different ways potentially, case law indicates that it ought to be construed against the drafter.

THE COURT: But --

MS. KOVSKY-APAP: That was my --

THE COURT: Caselaw doesn't say don't consider the extrinsic evidence. First, I have to decide whether there's ambiguity. If there's ambiguity, then the Court can take

extensive evidence. When I listened to the -- I'm tired -- extrinsic evidence, it may be that the scale weighs to you at that point, but I don't just look at the language and say, oh that language is ambiguous. I'll decide for the Withhold.

MS. KOVSKY-APAP: No, of course, Your Honor, and that was not at all the point I was trying --

THE COURT: That's what I thought you were saying.

MS. KOVSKY-APAP: No, no, no, no, no. No. I was saying that Celsius is saying the opposite that it's ambiguous, therefore their interpretation must prevail and I'm saying --

THE COURT: They're saying it's not ambiguous. They're saying that read the four corners of this document. It's not ambiguous and the result is Celsius kept title to it. Okay. You say it's unambiguous because title transferred was time limited for the time that it was in Earn. Okay. It's interesting because I've had other cases where each side said the contract is clear and unambiguous and favors my client, but they take diametrically opposed views about what it means.

MS. KOVSKY-APAP: And this --

THE COURT: My view is at that point, one of you is going to win at the end of the day, but only after I've given each side a chance to provide the extrinsic evidence.

It gets harder for you, perhaps, if your clients didn't even have a clue that there was such a thing as Withhold.

MS. KOVSKY-APAP: Well, Your Honor, let me address that, because I heard Mr. Koenig say that a couple of times and I was really shocked because that's actually contrary to what every single one of my clients put in their declarations.

THE COURT: If we get to the issue about extrinsic evidence, that isn't going to get decided right now, okay. I will decide whether, I think this contract is clear and unambiguous for you or for them and we'll see where we go from there.

MS. KOVSKY-APAP: Well, going back to the terms of the contract, Mr. Koenig made quite a point about the risk disclosure provision in Section 10 of the terms of -- are we okay over here?

THE COURT: No, I think the door seems to be locked from the out --

MR. KOENIG: It locks when it closes.

THE COURT: Yeah, I've got a key to -- we'll see whether anybody knocks on the door.

MS. KOVSKY-APAP: Okay.

THE COURT: I have a key that'll unlock it. I thought it was -- I guess the doors were open when everybody came in. Go ahead, Ms. Kovsky.

MS. KOVSKY-APAP: All right. So going back to what Mr. Koenig was arguing about the risk disclosure provision of the terms of use, at best, it's ambiguous whether these -- this provision, the risk disclosures apply to Withhold. Withhold's never mentioned there and importantly, the entire risk disclosure is framed in terms of using Celsius' services and Your Honor had raised the question as to whether Withhold constituted a Celsius service.

Mr. Koenig said, well yeah, it was a service. That's not what he said in his Custody and Withhold motion where he expressly stated on behalf of his clients the Debtors as a judicial admission, the Withhold account -- and I'm going to read this directly --

THE COURT: You know, I've had this issue of what's a judicial admission or not. I'm not -- you know, I don't buy it exactly, in the briefs, but go ahead.

MS. KOVSKY-APAP: Well, let's say for insight into what the Debtors actually thought about whether this was a service, what they said before was the Withhold accounts were not part of Celsius' service offerings and the Debtors have no contractual claim to title to the cryptocurrency and Withhold accounts.

THE COURT: (indiscernible).

MS. KOVSKY-APAP: Previously, they said this was

not a service and the reality is there was not a lot that anyone could do with coins that were in the withhold account. Really, you could withdraw them, you could make payments on a loan or you could meet a margin call. Those are the only things you could do, but you couldn't access any of the services that Celsius was providing. So it seems a little disingenuous to then say, well, these risk disclosures that apply to Celsius services apply to this, what we've called the no man's land where services really aren't being offered.

Interestingly, the Debtors' argument is also somewhat logically inconsistent regarding the risk disclosure because if it applies to everything on the platform regardless of how it got there or what its status is, if it's not in Custody, if you're on the platform, well then that would apply with equal force to pure Withhold, and clearly the Debtors' position is pure Withhold is not subject to these same issues, to these same contractual provisions. The Debtors' --

THE COURT: The pure Withhold never -- did not go into an Earn account.

MS. KOVSKY-APAP: They never were -- right. There was never a contractual grant of right and title in the first instance. They did, however, go into commingled Earn wallets.

THE COURT: I understand. There isn't going to be any tracing issue because it didn't go anywhere, it stayed there. They can trace back who it --

MS. KOVSKY-APAP: No, I don't think that's correct, Your Honor.

THE COURT: Did they sell the Binance? Did they deploy the Binance?

MS. KOVSKY-APAP: I'm not talking about Binance, Your Honor. I'm talking about Bitcoin and Ethereum and other eligible digital -- otherwise --

THE COURT: -- okay.

MS. KOVSKY-APAP: Right. No, so I think the Binance issue is a very small side issue. There are coins that would otherwise have been eligible digital assets that were deposited and the only reason that they weren't really supposed to be there is because they were coming from prohibited states,

THE COURT: Okay.

MS. KOVSKY-APAP: And those went right into the aggregated main wallets. They were used, deployed, et cetera. They can be traced in the sense that there's ample coins of the same type that can be returned to the owners of the coins and the Debtors are prepared to do that. For reasons that are really not clear to me, they're saying that well, if they were transferred from Earn to withhold as

opposed to landing in withhold from an external wallet, all of a sudden the treatment is completely different.

I do want to correct the record. I understand that Your Honor is not taking extrinsic evidence, but Mr. Koenig did make some factual statements about what my clients knew and when they knew it that are just not accurate.

THE COURT: I understand that.

MS. KOVSKY-APAP: Talked about the Debtors' intent, that there was never any intent that these assets --

THE COURT: I can determine -- I may or may not be able to determine intent from the four corners of the document.

MS. KOVSKY-APAP: That is likely correct. It's --

THE COURT: It is correct.

MS. KOVSKY-APAP: Yes. Well, yes, it may or may not be able to determine intent. We think that you can determine intent from the four corners of the document. Again, customers who granted rights to their assets, their property, weren't making, you know, a forever and ever grant of that right and title without any kind of limitations.

THE COURT: That's your position.

MS. KOVSKY-APAP: You went through some questions with Mr. Koenig about constructive trust and if Your Honor will indulge me, I'd like to respond to some of those.

THE COURT: Go ahead.

MS. KOVSKY-APAP: You asked whether there was a fiduciary or confidential relationship. I do want to point out that under New York law, and this is the New York Court of Appeals, that stated a person wrongfully acquiring property can be treated as a constructive trustee notwithstanding the lack --

THE COURT: They didn't wrongfully --

MS. KOVSKY-APAP: -- fiduciary relationship.

THE COURT: -- acquire the property. Your --

MS. KOVSKY-APAP: They wrongfully kept the property.

THE COURT: They didn't wrongfully acquire the property.

MS. KOVSKY-APAP: Well, they acquired it in the first instance, but after it was returned to the customers --

THE COURT: It wasn't returned to the customers.

MS. KOVSKY-APAP: It was returned to the customers, Your Honor, when it was transferred out of Earn and into the Withhold accounts. That's the Debtors' --

THE COURT: Well, that's an issue that the Court has to decided. Was it --

MS. KOVSKY-APAP: Right.

THE COURT: Did that -- you know, the Committee

says you have to focus on when it's repaid. Absent repayment, it hasn't gone back to the customer.

MS. KOVSKY-APAP: Well, the Debtors' position --

THE COURT: That was, I think one of her points.

MS. KOVSKY-APAP: That was one of the Committee's points, but the Debtors point --

THE COURT: No, the Committee is a party in interest and has a very strong stake in the decision. I'm not going to disregard the Committee's argument.

MS. KOVSKY-APAP: I'm not suggesting that you disregard the Committee's argument, but I am suggesting that it's important to look at what the actual parties to the contract are saying.

THE COURT: I've been reading it.

MS. KOVSKY-APAP: And what the Debtors said from the get-go was transferring coins on the ledger. Remember, this was not a blockchain transfer but transferring assets out of Earn and into Custody or Withhold extinguished the Debtor's contractual obligation to return those coins to the customers.

THE COURT: And Ms. Amulic points to Section 11 on the withdrawals.

MS. KOVSKY-APAP: And Section --

THE COURT: Look, I'm not saying I'm accepting the argument. But her argument is that under Section 11, until

it's repaid, it remains property of the Debtor. Ms. Amulic is that your -- that's your position?

MS. AMULIC: That's right, Your Honor.

THE COURT: Okay.

MS. KOVSKY-APAP: And my position is, these terms of use completely omitted any mention of Withhold.

THE COURT: They did.

MS. KOVSKY-APAP: And Withhold is very comparable to a Custody account.

THE COURT: Maybe.

MS. KOVSKY-APAP: It was the default account that the Debtors set up. They set up their architecture in this way. They could have left it so that if you want to --

THE COURT: No man's land because it's not expressly covered in the terms of use. Each of you argue about well, read this other section and it ought to apply to Withhold as well, maybe.

MS. KOVSKY-APAP: Look, the Debtors could have --

THE COURT: I understand this argument, okay. They did.

MS. KOVSKY-APAP: Well, yeah, they didn't. My point about the way that Debtors set up their architecture of the platform, they could have left it. So if you're in a prohibited state, you stay in Earn until you actually transfer to an external wallet.

THE COURT: Right.

MS. KOVSKY-APAP: They chose not to do that.

THE COURT: They did what's in here. When I say "here," is the Terms of Use Version 8.

MS. KOVSKY-APAP: They did what's here in the terms of use version, but --

THE COURT: What's your next argument.

MS. KOVSKY-APAP: So going back to responding to the questions that Your Honor had raised about constructive trust, Mr. Koenig argued reliance on -- there was no reliance because factually --

THE COURT: Did you have to know about it in order to rely on?

MS. KOVSKY-APAP: I don't know that you even have to reach that issue, Your Honor, because Mr. Koenig's statement of the facts was incorrect.

THE COURT: I'm sorry, I missed that last statement --

MS. KOVSKY-APAP: I don't know that you have to reach the issue of whether you can rely on it without knowledge because as a factual matter my clients did have knowledge.

THE COURT: That it went into Withhold?

MS. KOVSKY-APAP: Yes. And that's stated in their declarations. They absolutely knew about it and in terms of

what they relied on, they relied on the fact that the terms of use said that they were only granting title to the Debtor while they were in Earn, not beyond that. Mr. Koenig also said that the Debtors didn't act -- do anything that was unjust. They didn't do anything wrong. They were just trying to handle this huge volume of withdrawals as best they could.

I think that's also factually incorrect. The Debtors did do something wrong. They were operating in states where they weren't licensed to do so. They created an architecture --

THE COURT: No, no, no, no, no, no. They weren't operating in states they weren't licensed to do so. They weren't licensed to have Custody accounts in nine states.

MS. KOVSKY-APAP: They weren't -- it was beyond not having Custody accounts. They weren't licensed to hold cryptocurrency on behalf of customers, whether you call that Custody or whatever you want to call it, but that's exactly what they did. They allowed customers to transfer out of Earn where they said -- and if you look at all of their prior pleadings, they said we were holding these coins on behalf of the customers.

They were doing that in states they weren't entitled to do so and they were preventing those customers for a month before the bankruptcy filed, prevented those

customers from withdrawing their assets off of the platform, even though they had already exited the Earn program.

THE COURT: Okay. Next point.

MS. KOVSKY-APAP: The Committee says that there's no meaningful difference between assets that customers attempted to withdraw and assets that customers actually transferred out of Earn to Withhold just because those customers happen to live in prohibited states. I think the Committee gets it backwards. There's no meaningful difference between customers who transferred coins to Withhold and customers who transferred coins to Custody.

In both cases, they exited the Earn program. They exited that contractual relationship. In terms of looking at what was the Debtors' intent about that, look at what Mr. Nash argued on Monday to Your Honor. In order to have a contract, you have to have offer, acceptance, and consideration.

The four corners of the contract make it clear that the consideration for the grant of right and title that the customers were giving to Celsius while they were in the program, it was the rewards they were earning. It was the interest. Mr. Nash made that point himself. He said that that was -- and I have this exact words here somewhere --

THE COURT: You don't dispute that in the first instance --

MS. KOVSKY-APAP: But --

THE COURT: -- your clients entered into a contract with Celsius as reflected in Version 11 of the terms of use --

MS. KOVSKY-APAP: Version 8, Your Honor.

THE COURT: Version 8. Excuse me. Version 8 of the terms of use. You're not disputing that.

MS. KOVSKY-APAP: I'm not disputing that they entered into a contract. Correct, Your Honor. And the consideration with respect to the Earn program, that was the contract that they had entered into. They put coins in Earn and the consideration that supported that grant -- and it's spelled out in the terms of use themselves. If you look at Section 13, "In consideration for the rewards payable to you on the eligible digital assets using the Earn service." That's what you're granting your right and title to Celsius for. That's the quid pro quo.

THE COURT: Well, you know, people enter into contracts and sometimes they breach it. That doesn't abrogate the contract. It may give somebody a claim for breach of contract.

MS. KOVSKY-APAP: But it wasn't --

THE COURT: It doesn't -- you know, Celsius' title to the assets doesn't vanish into thin air because they breached a contract.

MS. KOVSKY-APAP: Your Honor, it wasn't a breach of contract. I'm saying following the terms of the contract itself, consistent, compliant with the terms of the contract.

THE COURT: Well, there's no -- there's nothing in the contract about Withhold accounts, so I mean, that's just --

MS. KOVSKY-APAP: No, it's not about Withhold account, but there's plenty about Earn accounts and it tells you when and to what extent you're granting right and title. And that's the intent of the parties as reflected within the four corners of the document.

THE COURT: Any other arguments?

MS. KOVSKY-APAP: New York.

THE COURT: All right. We're going to take a recess until two o'clock and we're going to come back and we're going to talk about preference. And I want to put a question that I want you all to address.

Could the Debtors, while -- this really goes to the Custody account holders who filed an adversary proceeding. Could the Debtors file a counterclaim for preference recovery? And if so, does Federal Rule of Bankruptcy Procedure 7054 (indiscernible) 54 -- well, hang on. Rule 54(b).

"When an action presents more than one claim for

relief, whether as a claim, counterclaim, cross claim, or third party claim, when multiple parties are involved the Court may direct entry of a final judgment as to one or more but fewer than all claims or parties only if the Court expressly determines that there is no just reason for delay." It goes on from there.

So if Celsius or if the Committee were granted standing to do so filed preference avoidance claims against the Custody account holders, would it then be clear that only if there is no just reason for -- I (audio drops) your partial judgment in favor of the Custody account holders because I conclude yeah, it belongs (audio drops). I'd have to, I could wait and resolve the preference avoidance claim before doing so.

So the only thing, you've stipulated that there's no prejudice for the Debtors not having asserted the preference claim at this point. So isn't the result that you've got to wait for the Court to resolve the preference issues? Anyway, I'd just like you to address that when we come back. So we're in recess until two o'clock.

CLERK: Judge? Judge?

THE COURT: Yes.

CLERK: Sorry. There's a party who has their hand up, Arshley --

THE COURT: No, we're taking a recess now. We're

coming back at two o'clock.

CLERK: Okay. Thank you, Judge.

(Recess)

THE COURT: All right, please be seated. When we broke for lunch, there was someone appearing by Zoom who wanted to be heard, and Deanna, is that person still online and wishes to be heard.

CLERK: No one's raising their hands. The party that tried to speak before, can you please raise your hand again?

THE COURT: All right, we'll go on. And if -- Deanna, if someone wants to be heard on what we were talking about, the issues from this morning, I'll certainly hear them but at an appropriate time. Okay --

CLERK: Thank you.

THE COURT: So let's move forward with the questions of should -- well, let me say this. There is no dispute with respect to title for the Custody account holders. There's agreement by the Debtors, the Committee, and the Ad Hoc Custody Account Holders Group that title to crypto assets pass to the Custody account holders when assets were deposited in the Custody accounts on or after April 15th, which is 89 days or less from the petition date and therefore raises the preference issues.

So in the joint stipulation that the parties

entered, it's ECF Docket No. 1044, under phase one, it described "Two threshold legal issues for briefing in phase one are as follows." First bullet point, "Whether assets in the Custody and Withhold accounts are property of the Debtors' estates, including whether the terms of use are unambiguous on the issue of ownership of such assets." And as to that point, there is no dispute as to the Custody account holders. There remains a dispute as to the withhold account holders.

And then the second bullet point is, "If the assets are not property of the Debtors' estates, whether the Debtor should nonetheless be allowed to continue to hold those assets and maintain the status quo with respect to individuals and/or accounts where the Debtors have potentially viable claims, including without limitation preference claims."

So I think that clearly is a right of the account holders. There may still be issues about allocating shortfall for Custody account holders. The -- that same stipulation, 1044, in Paragraph 9 provided that during phase one, the parties agree that, first bullet point, "All inferences regarding the existence, validity, and merit of preference or other claims against the Custody and Withhold claimants will be drawn in favor of the Debtors' estates."

The second bullet point, "The absence of a pending

action for preference or other claims against the Custody and Withhold claimants will not constitute either a basis for the Court to rule in the Ad Hoc Group's favor or waiver by the Debtors' estates of the right or any party asserting rights on behalf of the estates, including without limitation the Debtors, the Committee, or a trust to bring such claims."

And then the third bullet point was "The Court will not be asked to adjudicate the rights of any of the Debtors or other -- of the Debtors' other customers as part of phase one and for avoidance of doubt, the rights of Earn and Borrow customers are fully reserved."

So, we need to go on and discuss this issue of whether the Custody account holders should -- it should await phase two, issue that I raised at the end of this morning's hearing about the impact of Federal Civil Procedure 54(b) (audio drops) -- 54 which, so I want that addressed as well.

So, Mr. Ortiz, are you going to begin? You want the money back, the assets back, now rather than later.

MR. ORTIZ: Good afternoon, Your Honor. Kyle Ortiz of Togut Segal and Segal on behalf of the Ad Hoc Group of Custodial Account Holders. So we're going to leave the happy world of our 100 percent or 94 percent agreement and despite agreeing on title, we are, I think at a 0 percent

agreement on what that means, Your Honor.

And I've been thinking a lot as, I'm sure the other parties have, about how to bring clarity to what is a very kind of muddled picture today. And I think the way to do that is to really talk about what the parties have to start with, because we really, Your Honor, have two sets of assets that we've been talking about.

Not talking about Withhold, I'm just talking about within the Custody universe, there's two sets of assets that have been in a sense kind of mushed together and I think it's important to pull them apart because doing so helps demonstrate the legal entitlements and I think will provide context for this conversation.

So one set of assets we have is the actual digital assets in a Custody service that all parties agree is property of the Custody service users and not property of the estate. And then, separately, we have preference actions which are very clearly property of the estate. The estate owns those and they have owned those since the petition date.

And that's a very critical distinction, Your Honor, because it highlights where -- what the code provides and what it doesn't and what the property rights were on the petition date. And when I kind of step back to first principles, property rights as we all know, are defined by

state law unless the code specifically provides for some greater right. That's the Butner principle. Might have been the very first thing I learned in law school.

And when we put that through the lens of what the code brings in and what it doesn't, and how the Second Circuit has interpreted that in Colonial Realty saying, you know, you get this relatively broad estate under 541(a)(1) which unquestionably also includes the preference actions, but you don't get the proceeds on those actions until they recovered under 541(a)(3).

And there's nothing in the code or in state law that elevates the right they do have on the petition date, preference actions, to expand to something they do not have on the petition date which is title to this property. I'd note, Your Honor, the code also does not provide for any right to reduce collection risk or the right to reduce the cost of monetizing assets that are the Debtors such as the preference actions.

What the Debtors and the Committee are asking the Court to do is stretch the code. They're asking you to permit them a greater property right than they have and to hold property --

THE COURT: No, I don't think so. I mean, the -- the Debtors and the Committee acknowledge that 89 days before the bankruptcy, title to the assets transferred to

the account holders, transferred from the Debtors to the account holders. But they also say because it's 89 days on the face of it, it gives rise to potential preference actions. And so let me ask you this. Looking at Federal Rule of Civil Procedure 13, Compulsory -- A, Compulsory Counterclaim, do you agree that preference avoidance is a compulsory counterclaim to the claim asserted by the Custody account holders?

Yeah, this was transferred to us. You agree it was transferred to us, but it happens to be 89 days and, you know, Rule 13(a)(1)(A) so first, you know, (a)(1), "A pleading must state as a counterclaim any claim that at the time of its service the pleader has against an opposing party if the claim, A, arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and B, does not require adding another party over whom the court cannot acquire jurisdiction."

So this seems to me to have all -- the preference claim has, appears to me, to have all of the earmarks, characteristics of a compulsory counterclaim that would have to be asserted as a counterclaim to the adversary complaint that you filed. You filed an adversary complaint, said it's ours and it arises -- arising out of that same transaction or occurrence.

They say, aha, it's yours, but it's subject to

avoidance and you know, the parties entered into a stipulation. No one including me was particularly anxious at this stage to see a compulsory counterclaim of avoidable preference and have to deal with that as well at this stage. Indeed, in the somewhat unusual circumstances here, it essentially was agreed, well, you have a phase two where you could deal with the -- there may be defenses that -- to preference.

And so I -- when I read 7054 and I read Rule 13, you know, would you rather that the Debtor or the Committees tomorrow file a compulsory counterclaim against all of your clients for an avoidable preference? I mean, I thought that the -- I'm not advocating that, okay, and what I'm saying is it seems to me that the stipulation which dealt with, okay, what (indiscernible) move to phase two really was a way of, let's try and deal with this issue now. Let's see if we can find that there are -- what are the defenses to preference, et cetera.

And look, you know, so many of the cases I've had, I'm not -- no reason to think this is going to get there -- you know, there's a reorganization plan where a term of the plan is, particularly if it's a sale and there's another buyer who wants to run the business, they agree they'll wave preference claims. Okay.

I don't know whether that will happen or not, but

are you going to force the issue that the Debtor or the Committee has to seek substitute standing, you know, STN standing to file preference claims? Are they going to file it as a not only -- well, a class act, defendant class action, so they name every Custody account holder, not just the members of your Ad Hoc Committee or -- I don't think that -- even just naming the members of your Ad Hoc Committee - that's where I am.

I mean, look, I -- when this first came up, it's no secret, I expressed the unstudied view really, you expect me to return $200 million was the number people were bandying about at that time to some large number of Custody holders and basically saying to the Debtors or to the Committee or a litigation trust, you find them, you sue them, you try to collect later on. Well, you filed an adversary proceeding and it does seem to me to be a compulsory counterclaim.

MR. ORTIZ: Thank you, Your Honor. So a couple responses to that, Your Honor. I think in the first instance, there -- we filed an adversary proceeding in response to kind of running out of time to continue to wait for the Debtors, but the purpose of that was to just establish that as of the petition date, it was property of the estate. They filed a motion that provided for certain of those assets to be returned to certain people in

different buckets.

And a lot of what we were trying to respond to was to say in that motion, it should say that this is not property of the state. There was a declaratory judgment that it's not property the estate, so they're not disagreeing with that. So what --

THE COURT: I'm not disagreeing, either. You filed the adversary proceeding. The consequence of that is, if forced to do so, somebody is going to file a preference avoidance counterclaim and I'm not going to decide the issue. You get $200 million back now and later on, somebody can decide whether they can chase however number of people there are to try and recover the preference avoidance.

I don't have to do -- under Rule 54(b), I don't have to do that. Okay. We don't have the counterclaim, but you didn't want the counterclaim and you entered into a stipulation that says, you know, all inferences are drawn in favor of the Debtors and the absence of a pending action for preference or other claims will not constitute the basis for the Court to rule in your favor or not.

So that's basically -- you know, you get in issues about injunctions and everything else. It doesn't seem to me to be that. This is a compulsory counterclaim.

MR. ORTIZ: No, I --

THE COURT: Well, let me -- do you agree it would

be a compulsory counterclaim?

MR. ORTIZ: I don't like disagreeing with judges. I want to find a way to say I would --

THE COURT: No, you can disagree with me.

MR. ORTIZ: -- agree. No, but I think the issue, Your Honor --

THE COURT: It's quite all right.

MR. ORTIZ: -- is that the -- I don't think it's a compulsory counterclaim to who had title. It is a compulsory counterclaim to --

THE COURT: It is to getting it back.

MR. ORTIZ: Yes, Your Honor.

THE COURT: So you don't want it back?

MR. ORTIZ: Not through that adversary proceeding. I think the purpose was to get --

THE COURT: You don't want it back?

MR. ORTIZ: We do want it back, but --

THE COURT: You don't want it back -- do you want it back now?

MR. ORTIZ: We do want it back now, Your Honor.

THE COURT: Well, that raises this whole issue of the compulsory counterclaim and the Court adjudicating it all at the same time, not entering judgment until the issue about -- because look, how much the Custody holders get back is going to be determined in large measure by a resolution

of the preference issue. I don't know.

MR. ORTIZ: I --

THE COURT: I'm not saying what the resolution of that is.

MR. ORTIZ: Your Honor --

THE COURT: Largely going to be determined by that.

MR. ORTIZ: A couple of responses to that. I do think that there is no question that all of these users have preference exposure. They do. And as you note, we don't know that that will ever be brought. And I should note that this isn't -- there's 58,000 people that are in the Custody program. That is 200 million. There are billions. I don't know the exact number. I don't know off the top of my head, but it's like two or three billion of people who got --

THE COURT: Like 300,000 account holders.

MR. ORTIZ: No, no, I'm not talking about account holders, Your Honor. I'm talking about people who got off in the 90-day window. So there are people who between when Custody existed and between 90 days and when the pause happened actually got off the platform and that's a number in the billions, but --

THE COURT: That's the statute.

MR. ORTIZ: That's the statute, Your Honor.

THE COURT: Unless they were insiders.

MR. ORTIZ: But all those people have that same risk, and I think that the point that we're trying to make is not only do we not know if they'll ever bring preferences, but we don't know if they'll bring preferences for in-kind, what was transferred, or if they'll bring for the value that's transferred and that that matters, Your Honor, because this is not just dollars sitting in an account.

We keep talking about dollars but it's not. It's coins, the value of which is changing on a daily basis. And if they choose to bring dollarized claims against folks and they didn't have access to their own property and they didn't have the freedom to use their property to potentially get out of crypto if that's what they want to do and put it in an interest bearing account, if the Debtors come back looking for dollarized claims or if there's just real harm for real live people versus what I think really amounts to, is there a collection risk and, you know, if we're going to say that there -- I don't think we addressed the compulsory issue and we could potentially brief that, but if we're going to --

THE COURT: It sure looks like it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Do you have any argument that it's not? And you know --

MR. ORTIZ: Well --

THE COURT: And if not, it's -- look, if it's not compulsory it's permissive and for sure I'm going to let them assert the permissive counterclaim. I think it's compulsory, but I don't have to decide that. And Rule 54(b), it doesn't hinge on whether it's compulsory counterclaim, permissive counterclaim.

You know, Mr. Ortiz, in Motors Liquidation when I took it over from Judge Gerber and there was the avoidance action about the messed up repayment to 500 financial institutions of a loan that was mistaken, where the collateral was mistakenly released, they were repaid, okay. It was a headache to deal with 500 and it was streamlined that the parties agreed, okay, who would participate in the adversary proceeding and it was tried and decided.

It wasn't 50,000. And it is certainly -- it's unappealing to me and I would think to all of you out there to say that 50,000 people are going to be dragged in and named as a defendant in a preference avoidance action that may never have to be brought. That's really -- we don't know.

MR. ORTIZ: Right. I think the issue, Your Honor, is again, I come back to the fact that this is not something that just sits idle, that the time impacts the actual users and you have things like, you know, if they want to bring --

even if it's compulsory counterclaim, there are things like orders of attachment. I mean, this is a lot of funds and it lost 40 percent of its value between the petition date and now, and that's significant value that could be -- that folks could continue to lose, and if they ultimately decide at the end of the day, we aren't going to bring a preference action and these people get back something that's worth --

THE COURT: Okay, I want the answer to the question. Is it a compulsory counterclaim? You got the code in front of you? You have the rules in front of you? Do you have any doubt?

MR. ORTIZ: I -- unfortunately, Your Honor, I do have a little bit of doubt just because of what we were seeking. And I'm not trying to be difficult, Your Honor. I'm really not.

THE COURT: You were seeking a determination that it's owned by your clients and they want the assets now. If you stipulate on the record that all you want is a determination that they own the assets and you're not pressing for a return of the assets until the issues are all resolved, tell me that now, too. I mean, I -- look, Mr. Ortiz I'm not -- I really don't want to give you -- not trying to give you a hard time.

MR. ORTIZ: No, I know you aren't, Your Honor.

THE COURT: But what -- look. I really think that

the stipulation that you all worked out, the procedures, made enormous sense. Whether at the end of the day, that's going to really get all the issues resolved or not, but it tried to come up with a way that isn't going to bury people in discovery forever and is going to try and sort of crystallize the issues about it and you want to jump start that, you want the assets now rather than a -- after phase two. I don't know whether you get it after phase two.

You might. I don't -- you know, you might have some very good arguments as to why they're not avoidable preferences. I don't know. I'm not drawing any conclusions about that at all.

MR. ORTIZ: I understand, Your Honor. I mean --

THE COURT: I marveled at the start when I saw 89 days. How did that happen? But you know, I think at some hearing I said that's how Baldwin-United came about. There, it was because of the workout agreement where they gave security to previously unsecured creditors. And you know, the unsecureds were afraid if it goes 90 days, they're going to have perfected security interest in most of the assets and so they filed involuntary 89 days.

That's not how -- here the Debtors filed 89 days. You know, I'm sure you wish it was 91 days.

MR. ORTIZ: Yeah, although I'm not sure that would matter. I think the 89 days was the beginning of the

program. There's lots of people who would have had transfers after that. I'll note that the very beginning of my career was being pulled out of an orientation to help work on Lehman and seeing the masters of the universe throwing up in garbage cans. So I don't believe in conspiracy theories, because I just don't think there's people that are smart enough, particularly when you're dealing with an issue where things are falling apart.

But I do, I think we -- look, if we had the opportunity to brief the issue, and I don't want to slow down this process --

THE COURT: Would it make a difference? I mean, look. Because if it isn't compulsory, it's permissive and the same result could apply. Rule 54(b), 7054(b), doesn't hinge on whether the counterclaim is permissive or compulsive -- compulsory.

MR. ORTIZ: Okay. Well, so I guess if we're going to say it doesn't matter if it's compulsive or permissive and that's where we're going, we'll just, we'll speak from that place.

THE COURT: If you disagree with that, go ahead and tell me. Sometimes I get things wrong, you know.

MR. ORTIZ: No, Your Honor. I'm not going to disagree with that at the moment. But I think, you know, some of the things, I still think there needs to be some

level of protection for these claimants, even if you're saying we need to go through a phase two, and that's the problem --

THE COURT: You want them to liquidate all of the crypto assets that are in Custody accounts?

MR. ORTIZ: Liquidate them all?

THE COURT: Yeah.

MR. ORTIZ: But they're not the Debtors' to liquidate at the moment.

THE COURT: Well, you're saying you're afraid it's going to depreciate in value.

MR. ORTIZ: I'm not --

THE COURT: You want to reach an agreement that that provides that they'll sell it all in the ordinary, you know, in an orderly fashion to try and -- most of the creditors, the last thing they wanted was to be repaid in fiat.

MR. ORTIZ: No, I understand that, Your Honor. I think that the issue is, we may have agreed to something of that sort in July, it was a very different market value. But most of the creditors -- and I don't consider our clients creditors at the moment -- but most of the people, they are true believers. I'll acknowledge that a lot of them want it back, but they might not want it back to use it in the particular way that the Debtors were going to use it.

They -- and we shouldn't speculate on what they --

THE COURT: The Debtors aren't using it now.

MR. ORTIZ: They're not using it, but I think, look, the -- part of the rights you have as a property owner, as the title owner of a property is to do with it what you will. And when you're restricted from that ability --

THE COURT: Unless you're a preference defendant and the Court, you know, compulsive or permissive, I think it's compulsory counterclaim, is going to, okay, I'm not putting you off forever.

MR. ORTIZ: I mean, the time matters and I understand --

THE COURT: I've been bending over backwards to try and get these issues resolved. --

MR. ORTIZ: You know, and look, I appreciate that we've put this on a somewhat expedited schedule to try to make that all happen, but when we're looking at holding something pending an action involving it, there needs to be --

THE COURT: Persuade me what legal principles say you should get the money back now. When I say money, get the crypto assets back now.

MR. ORTIZ: Well, we don't necessarily --

THE COURT: In light of the stipulation that you

signed, Paragraph 9, you know, what is it that you're saying, what legal principle requires that the Court order that the assets be returned to the Custody account holders?

MR. ORTIZ: Well, I think that the issue on that and -- know judges hate when people say respectfully because it's --

THE COURT: Oh, just --

MR. ORTIZ: -- but Your Honor, I don't think -- I think that's actually, I hate to say flipping on its head because there was a burden that we had, which was to show title. That's been agreed. Burden then is on them to show a basis to hold it.

THE COURT: And if they filed the counterclaim -- look --

MR. ORTIZ: But even if they filed a counterclaims, Your Honor --

THE COURT: It's not -- you don't -- look. You're not contending that the assertion of a preference claim would be in bad faith.

MR. ORTIZ: No, Your Honor, of course not.

THE COURT: Okay.

MR. ORTIZ: But I am asserting that they don't get title to it and the ability to hold it and enjoy it and do with it what they will until there is a recovery on that preference claim. That's what Colonial Realty said under

541(a)(3) versus 541(a)(4), and I know what the concern is, Your Honor. I completely understand --

THE COURT: But 54(b) makes clear that I adjudicate -- I can, I probably should in these circumstances, adjudicate them together.

MR. ORTIZ: But even if we're adjudicating them together, during that time, they don't hold title.

THE COURT: They're not using it.

MR. ORTIZ: They're preventing the title owners from using it and enjoying their property and --

THE COURT: Okay.

MR. ORTIZ: -- deciding --

THE COURT: It's in dispute, okay, and as to one of the claims, you've come to an agreement with the Committee and the Debtors about title. Okay. So, but I come back to 54(b). "When an action presents more than one claim for relief, whether as a claim, counterclaim, cross claim, or third party claim or when multiple parties are involved, the Court may direct entry of a final judgment as to one or more, but fewer than all claims or parties only if the Court expressly determines there is no just reason for delay."

And the just reason -- the no just reason for delay here is that good luck, litigation trust or Committee or Debtors chasing 50,000 people, entities to recover

preferences. That's -- you know, there is a just reason for delay. Okay? And look, there's no question. Nobody's filed a counterclaim, but you essentially negotiated for them not to do that at this stage, and you set out procedures to follow for phase two, including, you know, selecting -- I won't go through the whole thing. This is Paragraph 10 of that ECF 1044. You know, paragraph -- "To the extent necessary and depending on the Court's ruling on the phase one issues, the parties shall further brief the Custody and Withhold issues in phase two as set forth herein." And you had a schedule for doing that.

MR. ORTIZ: I understand that Your Honor, but I think the issue is that --

THE COURT: Maybe more than I bargained for, no later than 60 day -- calendar days after the filing of the preference defense motion the Court's supposed to have a hearing. It is not getting put off for years.

MR. ORTIZ: I'm not saying that, Your Honor, and I think even if you're going to -- if you look at Rule 13 and you look at, you know, Rule 54(b) which I really looked at as more designed to prevent piecemeal appeals, but I think the important thing there is that gets to final judgment. It doesn't get to who today has the right to hold the property. They -- everyone agrees --

THE COURT: They agree that your clients have the

right to hold the property, but they don't want to give it back until the preference issue is resolved because there is a good faith basis to believe that the transfers 89 days before bankruptcy are voidable.

MR. ORTIZ: I appreciate that, Your Honor, but I think the issue is that that's what they're trying to accomplish. That gets to -- if we all agree to title and they want to say that there is also this preference action, that essentially amounts to an injunction preventing these people from having their property.

THE COURT: Do you want --

MR. ORTIZ: I think it's important --

THE COURT: Do you want to force the Debtors or the Committee if they get STN standing to file a preference action against your clients? Is that what you want? You know, if you're insisting, I'll think about it. I don't think I have to under the terms of the stipulation, but is that what you really want or do you want to proceed in the orderly fashion that the stipulation provided?

MR. ORTIZ: I don't necessarily want preference actions brought against our clients, but I do think that if people are in -- while that is all waiting, being deprived of their property, which is, you know, a very high burden and -- I'm going to step back, Your Honor, just one second. When we were talking in the 107 context about privacy and

the U.S. Trustee made a point that I thought you liked, which was you really need to show evidence for each person.

What we're talking about is there being a potential risk of collection, but there's no evidence that they'll have difficulty with these people other than the quantity and like everybody would have to submit to the jurisdiction of the Court and it would just put them on the same plain as the people who --

THE COURT: How many clients are on your committee?

MR. ORTIZ: On our committee? It's about 70 right now, 70 or 80.

THE COURT: You know, Mr. Ortiz, it's the combination of the stipulation that you entered into; the requirements of Rule 13 on counterclaims, which I think here is a compulsory counterclaim, but really almost doesn't matter whether it's permissive, compulsory; and 54(b), 7054(b) that if -- that I don't have to make them file, I don't have to put them to the test and say look, you either filed a counterclaim or I'm going to order the funds given back.

I think the stipulation that you entered into allows me to continue, I'll call it the pause, and it's not the same pause that Celsius put, that will go forward on the schedule. I don't know. I mean, I'm sure -- I don't want,

you don't need to do it now. It's defenses to the preference claim.

MR. ORTIZ: Yeah, there -- look, clearly there's defenses, but that doesn't change what Your Honor is saying, whether it being permissive or mandatory that they have, they can bring that. I just, I'm going to take a slightly different approach, Your Honor, and again, I get back to what I essentially think if everyone's agreeing that there's title, what the Debtors are essentially saying is that because they have these preference actions and if you allow the non-estate assets to leave, there's going to be a potential cost to collecting them which might devalue something that the Debtors do have.

They own preference actions. Under no circumstance deny that and the risk is if we let these people go, it devalues that because you have to go find them again. And I think Your Honor actually addressed this issue once before in a different context, in ResCap in the Invest Vegas case where there was a lift stay in connection with selling certain HOA rights that there was a junior lien that the Debtors had and the main --

THE COURT: -- that a law about priorities? Is that --

MR. ORTIZ: No, Your Honor, so --

THE COURT: -- recollection.

MR. ORTIZ: So what -- to just kind of refresh your recollection --

THE COURT: Please don't.

MR. ORTIZ: Okay, I won't but the point there, Your Honor, was that something that --

THE COURT: You know, I kind of -- this is-- I'm interrupting. During -- ResCap was filed in 2012. During the course of that case, I decided law of 26 different states, in written opinions. I don't want to have to do that again.

MR. ORTIZ: The only point I'm going to make on that is that what the defendant said, there was the protection to the automatic stay extend to protect value of the property of the Debtors' estate, and you ruled that that is not the case. If you don't own the property, even if selling it will result in something that changes the value of property, which in this case would be the preference actions, that's not enough to say that there was, in that case, a violation of the stay. So I think there's some --

THE COURT: --- the automatic stay. I mean, this is, as I say, maybe I'm wrong. It's three things, the stipulation that all inferences are in their favor around the preference claim, no prejudice as a result of them not having asserted it, and Rule 13 on counterclaims. I think this is compulsory but even if it's permissive, you know,

okay. And Rule 54(b). If it got asserted as a counterclaim, I could simply decide that under 54(b), you can't establish no just reason for delay in entering a partial judgment.

And just the opposite, the just reason for the delay is that I don't want anybody having to chase 50,000 people to recover a total of approximately, you know, somewhere, whether it's 200 million today or 180 million, whatever, it's a moving target because the value of crypto.

MR. ORTIZ: But that value of crypto matters, Your Honor. These are real people with real --

THE COURT: Yeah, I understand that.

MR. ORTIZ: -- dollars that have -- the delay, and again, I don't think it's --

THE COURT: Mr. Ortiz, you wouldn't be standing before me today if I didn't understand this point about -- I've probably said and just -- if it's not the Debtors' and it should go back to somebody else, it's got to go back sooner rather than later. I agree completely. It was about that point and someone says 89 days. So yeah, there are preference claims. There are even good defenses to it. You have a schedule. You agreed on a phase two schedule. That's in Paragraph 10 of ECF 1044.

You know, unless you all agree to alter that schedule, that's the schedule.

MR. ORTIZ: Something tells me, Your Honor, with where we're headed that the other parties won't be looking to modify that schedule. But I don't -- the problem I'm having, Your Honor, is just all of that doesn't change who has possession at the moment. And they have to have a right to that and that's when I get to things like (indiscernible) attachment or whatever you need to compensate people for the fact that they're not getting to use and enjoy their property and I think there's a serious risk.

If I'm the Debtor -- and I'm going to be honest, what I would do if I was the Debtor, if the value drops significantly, I'm going to bring preference actions, if I bring them, based on the value. If it goes up, I'm going to bring them based on what was transferred. That's what, you know, most Debtors would do. So there's a real --

THE COURT: There's Paragraph 3 of the stipulation. "The deadline to respond to the Custody complaint is adjourned pending resolution of the Custody and Withhold issues." So they haven't had to file a responsive pleading. If they filed a responsive pleading, I think they'd have to file the counter -- the preference counterclaim.

MR. ORTIZ: Right, Your Honor, and part of the reason that was delayed is if in the context of phase one and in the context of the Debtors' motion, it was determined

that the property is -- the title is with the account holders, there's no reason to go forward with that action and then we would have done what we would have otherwise talked about today and turned to --

THE COURT: So it says --

MR. ORTIZ: -- Section 19(b).

THE COURT: -- "is adjourned pending resolution of the Custody and Withhold issues," which I view as involving not just phase one but the phase two issues.

MR. ORTIZ: Well, I don't think that was necessarily the design, Your Honor.

THE COURT: You don't think so?

MR. ORTIZ: The reason you have a phase one and phase two is if you can resolve it in Phase one, you don't have a phase two. Otherwise it would just been --

THE COURT: So if you had lost on phase one, you won on Phase one. If you had lost on phase one, you wouldn't have to get to phase two. You won on phase one. You won by their agreeing with your position. Okay. But you hadn't one on phase two.

MR. ORTIZ: Right. Well I mean, we won on question one of phase one, Your Honor. Question two of phase one was, "Does that mean they have to give it back?" Okay. And our view outside of -- even if you have Rule 13 and Rule 54, is that they do because it's not theirs. And

all of this will be adjudicated and that was the point I was -- I think I was trying to make in the beginning was that they don't lose a right. They don't lose a property right.

THE COURT: I'm not entering judgment for your clients. The title is theirs. And they ought to get stuff back now. (indiscernible) the notion of I hope there are never preference actions. I hope the outcome of this case somehow results in this issue getting resolved satisfactorily to your -- to the Custody account holders. I don't know whether it will or not. But for the stipulation, I would tell them I'll hear your compulsory counterclaim, let's go.

MR. ORTIZ: But then wouldn't they be put in a position, Your Honor, where they have to decide now --

THE COURT: Yes, they have to decide now or have judgment entered on your complaint that belongs to your clients. And then the issue of, if that's the only thing that's said, if there's no preference claims -- you know, if the Debtors -- I'm sure the Committee is going to ask for standing to file it if the Debtor declines to do it.

MR. ORTIZ: Well, I think that'll, you know, depend on the outcome of various plan and sale discussions. But you know, in a normal context, you have the choice that, you know, it's interesting because the Debtors and the Committee both point to 502(d), but that would make the

people who are creditors, and I don't think --

THE COURT: And your position is they have title, they're not creditors. They're not filing a claim for it.

MR. ORTIZ: But even if they were --

THE COURT: -- under 502(d).

MR. ORTIZ: But, right. But even if they were creditors, which they're not, 502(d) essentially provides you a choice. You can sit there and say I'm going to keep these funds and not file a proof of claim and see if the Debtor comes and then I'll share pro rata or I'm going to give it all back and take what's pro rata and there's a risk that you take there and that's -- they don't even have that and they're in a higher position as titleholders. And I think --

THE COURT: Higher position as titleholders with a good faith basis for preference avoidance actions for their having gotten title back.

MR. ORTIZ: But I don't think it's even they haven't got title back. They have title, right. It's --

THE COURT: Got it back --

MR. ORTIZ: Possession --

THE COURT: -- 89 days before the bankruptcy filing, giving rise to a good faith basis for preference claims.

MR. ORTIZ: Right. Got title back within 90 days,

Your Honor.

THE COURT: Let me hear from other counsel. Ms. Kovsky, I -- come on up to the podium.

MR. ORTIZ: Thank you, Your Honor.

THE COURT: Thank you. So let me just say, the issue of whether the Withhold account holders have title or not is not being decided today. Okay. But if the Court decides let's push forward with phase two, my strong preference is for you to agree that you will actively proceed with phase two with your clients. The stipulation is less clear what happens if I don't decide phase one.

MS. KOVSKY-APAP: Understood, Your Honor, and I think we had all sort of contemplated there would be a decision before triggering phase two.

THE COURT: Well, there's a decision as to the Custody.

MS. KOVSKY-APAP: Absolutely. And one thing I just wanted to flag because Your Honor had said something in the morning session that sort of struck me, but I wasn't sure I fully understood it. You said that in this phase, you're only looking at whether the contract is ambiguous or not and deciding within the four corners of the contract and I don't think that's quite what the parties have stipulated and what we had intended to put before Your Honor.

It was who owns it, including whether the contract

is ambiguous, but not limited to that, which is sort of why we put in all of these facts and had all this evidence that was admitted into the record. But I just wanted to make sure that that was flagged as a housekeeping --

THE COURT: Bullet point 1.5, bullet point, Paragraph 5, whether the assets in the Custody and Withhold accounts are property of the Debtors' estates, including whether the terms of use are unambiguous on the issue of ownership of such assets." And including. It doesn't say --

MS. KOVSKY-APAP: I think the part -- just to clarify, I think the parties' intent was that Your Honor would look at everything, including the evidence that we submitted to the record. With respect --

THE COURT: Do I have everything that either party would want to introduce on the issue of extrinsic evidence regarding the meaning of the contract with respect to Withhold account holders?

MS. KOVSKY-APAP: I have to be really honest, Your Honor, I was kind of thrown for a loop when the Debtors completely did a 180 on their position as to the ownership of the Withhold assets.

THE COURT: Well I noted with -- the flip, too --

MS. KOVSKY-APAP: And -- yes. And with the luxury of more time and had Your Honor not been in hearings this

entire week with everybody tied up, you know, on various different matters, I would have sought discovery on those issues to pin that down, because it's an entirely different factual landscape than what we thought we were dealing with. So if --

THE COURT: It's not entirely different from what it was when you entered into the stipulation. It's when you got the first brief, this is their position, and then you get the reply and the position changes.

MS. KOVSKY-APAP: Well, really, if you go back to the original Custody and Withhold motion, the motion to reopen withdrawals, that was really where we were starting from and then the Debtors went in completely the opposite direction. So in answer to your question is all of the evidence in the record that we would want to have in the record, probably not. And if we had the opportunity to take some additional discovery and to put the full universe of facts before Your Honor --

THE COURT: Don't start that before I issue some sort of ruling, okay.

MS. KOVSKY-APAP: Understood. With respect to phase two -- or let me back up. With respect to the question of if Your Honor were to rule in favor of the Withhold account holders at some time before phase two, should the Withhold account holders be allowed to withdraw

their assets, we're a little bit differently situated than the Custody account holders. There's no pending adversary proceeding. We're in prohibited states where the Debtors can't hold assets on behalf of customers.

So they've got a regulatory problem in nine states. It's a pretty small problem. It's only nine states. It's only about 5,000 accounts. So there is a little bit of a different impetus to say, okay with these, with this small bucket off to the side, maybe it makes sense to send these off and send them back to the Withhold account holders, even if there's some risk that there might be increased cost or difficulty in collection later, if the Debtors bring a preference, if they're successful, if -- you know, there's a lot of ifs built in there.

And one thing I did want to just note, we framed this in our brief as a basically a prejudgment attachment. And I think that's really what it is, and I think that's sort of what Mr. Ortiz was articulating that you have something that is -- and certainly with Custody and arguably our position with respect of the Withhold --

THE COURT: If I rule that it's property of the Withhold account holders, you have the same preference issue Mr. Ortiz has.

MS. KOVSKY-APAP: We do have the same preference issue, but notwithstanding that same preference issue, there

are countervailing considerations.

THE COURT: You have the same preference issue that Mr. Ortiz's clients have.

MS. KOVSKY-APAP: Yes, we do, Your Honor.

THE COURT: And while you didn't file an adversary proceeding, you filed a motion to lift the stay. The Debtors -- we've essentially gotten over that procedural hurdle. We did the stipulation. I'm trying to deal with them all together. The Debtors could file their preference action if I were to rule that it's property of the Withhold account holders.

MS. KOVSKY-APAP: Correct, Your Honor, and to answer the question you haven't asked yet, no, we do not want them to do that.

THE COURT: I'm sure Mr. Ortiz doesn't want them to do that either. I'm sure his clients don't want them to do that.

MS. KOVSKY-APAP: I hear Your Honor and I hear your position on this, and I won't take up more of your time. I just wanted to flag that there were some procedural differences and some regulatory differences that notwithstanding the Court's disinclination to let property go that the Debtors have ready access to in the event that they get a judgment, there are some countervailing considerations that are applicable to the Withhold account

holders.

THE COURT: Thank you.

MS. KOVSKY-APAP: Thank you.

THE COURT: All right, let me hear from the Debtors. Mr. Koenig.

MR. KOENIG: Good afternoon, Your Honor. Chris Koenig, Kirkland and Ellis, for the Debtors. I'll keep it brief here, but just wanted to raise a couple of points. From the Debtors' perspective, we entered into the stipulation to streamline the process, try to shorten the process from what it would otherwise be if it was a full on adversary proceeding and to try to minimize costs for the estate. The estate is very expensive. We would like to get to the right --

THE COURT: -- also want to minimize the cost to Mr. Ortiz's clients.

MR. KOENIG: Certainly, certainly. And so --

THE COURT: And --

MR. KOENIG: And for all parties to have answers on key issues as promptly as possible. I think all the parties agree that the preference defenses are complex, novel, and difficult, and we're going to be working through that in phase two, but rather than, in the early days --

THE COURT: -- try to settle them as well.

MR. KOENIG: Of course. In the early days of

September, we filed our motion, the Custody Ad Hoc Group filed their adversary proceeding. I forget whether they filed it first or we filed it first, but it was in a matter of minutes or hours from each other. And Ms. Kovsky filed her lift stay motion maybe a day or two later.

We could have at the time filed our own counterclaims, filed our own adversary proceeding, but we didn't think that that made sense. What we thought made sense was to streamline the process, try to minimize the cost, and try to get to the right answer as promptly as possible. Because if everybody just sues everybody, it's going to create a lot of paper. It's going to create a lot of cost, but it's not going to necessarily get to the right answer.

And so what we did is we entered into this stipulation, which allows all the parties to pick what are effectively bellwether defendants for these preference claims so that all parties will receive from Your Honor in phase two, indicative rulings under a whole host of different factual circumstances. Maybe the preference claims are different if somebody withdrew the day before the pause versus 89 days before the pause. Maybe it matters how much they withdrew. Maybe it matters what remains on the Debtors' platform, if any.

Those are all issues for phase two, but we did

this in order to get clarity and to try to minimize costs, and that's why we did what we did. Of course, in the absence of a stipulation, we would have commenced a whole host of other litigation because, you know, my litigation partners, when they looked at this issue said we have to file. We have to file a complaint. We have counterclaims that have to be asserted, and we said that just doesn't make sense here. Let's get to the right answer.

THE COURT: I agree with your partners.

MR. KOENIG: They're certainly smarter than I am on this issue, Your Honor.

THE COURT: Well.

MR. KOENIG: So in any event, simply put, today the Debtors have an effective remedy with respect to the Custody and Withhold assets to the extent Your Honor would enter judgment in favor of the Debtors on any preference claim. We could simply move the assets on the ledger, on the blockchain, whatever Your Honor ordered us to do, we could do. There would be no cost. There would be no risk. There would be no delay.

If we were to return those assets to the custodial account holders and the Withhold account holders -- easy to say -- we would undoubtedly have risk, cost, and delay. That is a natural -- that is a natural consequence.

THE COURT: Your Honor, in Motors Liquidation when

they sued 500 financial institutions, many of whom were outside the United States, there were a whole host of problems about service of process outside the United States, compliance with the Hague convention and it became -- and that was only 500. We got it resolved, but that issue, and then tried -- they tried -- they agreed we would try as certain of the parties and everybody would be bound. But I can't imagine what it would -- the issues, because they're not all sitting down the street in New York. The service of process issues alone -- anyway.

MR. KOENIG: So for that reason the Debtors believe it is appropriate for them to maintain possession and control over the Custody assets and the Withhold assets, pending our expedited phase two proceeding. And then depending on what Your Honor rules, today we believe that we have prima facie preference claims. We have established that we have prima facie preference --

THE COURT: No one disputes that.

MR. KOENIG: And at some point in the future we may not, depending on how Your Honor rules in the various defenses. Perhaps Your Honor will rule that Section 546(e) is a complete bar to any preference claim. Perhaps Your Honor will rule that ordinary course of business defense applies in every possible circumstance. Maybe Your Honor will rule that it applies in some circumstances, but not

others. We don't know until we get there. So we'd like to hold onto the assets and preserve value until we get there.

THE COURT: Okay.

MR. KOENIG: I don't have anything else unless Your Honor has questions for me.

THE COURT: Did you want to be heard?

MR. KOENIG: Thank you.

MR. HERSHEY: Very, very briefly.

THE COURT: Just go up to the microphone, Mr. Hershey, so we get a clear record.

MR. HERSHEY: Good afternoon now, Your Honor. Sam Hershey, White and Case for the Committee. I'll be extremely brief.

Your Honor asked a question. I'll just briefly say, we agree with Your Honor, it's a compulsory counterclaim. The last sentence actually of the complaint, DI-662, this is Paragraph 62, says "The Debtor should be required to permit withdrawals of Custody assets in accordance with the terms of use." They requested that relief. We viewed it as a compulsory claim. That's why we actually entered into the terms in the stipulation that Your Honor read. I think you've figured that out. And we don't believe Your Honor should exercise your discretion to grant partial summary judgment.

THE COURT: Okay.

MR. HERSHEY: -- that, we'll rest on our brief. Thank you.

THE COURT: Thank you. Ms. Kovsky, go ahead.

MS. KOVSKY-APAP: Deb Kovsky for the Withhold Group again. Just wanted to raise one issue following on something that Mr. Koenig just said, is that the Debtors are able to hold on to these assets and are going to be there and it's going to be just fine and, you know, there's no risk or harm to them holding onto them, and that's true with everything that's in the Custody wallet because they've put those aside and aren't doing anything with them. There's still a question mark -- and Your Honor said you're not prepared to rule on it today -- as to the ownership of the Withhold assets which are currently sitting in an aggregated wallet.

And so as we proceed down this path, I would request that some measures be put into place to ensure that at a minimum enough assets are kept sort of --

THE COURT: Let me --

MS. KOVSKY-APAP: -- set aside to satisfy the Withhold --

THE COURT: -- raising. What I would ask you to do is to confer with the Debtors' counsel and see if you can come up with an appropriate solution for this by having some agreed assets put into a separate a wallet to be held. It's

not a separate wallet because they're different coins in those different wallets, but work out, see if you can work out the arrangements. If you can't, contact my chambers and we'll have a, hopefully a very brief -- I have a feeling you're going to work this out.

I understand your point and I'm not -- see if you can work this out. If you can't, we'll have another quick hearing.

MS. KOVSKY-APAP: Well do, Your Honor. Thank you.

THE COURT: All right. Mr. Koenig, what's your view about the issue Ms. Kovsky's just raised?

MR. KOENIG: Your Honor, Chris Koenig. I understand and I had not thought about that. I think it's a great issue that Ms. Kovsky raised, I think that we need to talk about. I understand her point that, you know, her client should not be prejudiced by, you know, the lowest intermediate balance test is met for today with respect to five coins and I understand her point that she doesn't want to wake up tomorrow and have it be, you know, only five coins that it is met for. So we'll meet and confer and --

THE COURT: You ought to be able to work this out.

MR. KOENIG: Yes.

THE COURT: Okay. Ms. Kovsky, I guess the last question is, are you prepared to push forward with phase two even though I haven't ruled as to your clients with respect

to phase one?

MS. KOVSKY-APAP: Yes, Your Honor.

THE COURT: Okay. All right.

MR. ORTIZ: Your Honor, I just want to make a --

THE COURT: Go ahead, Mr. Ortiz.

MR. ORTIZ: -- quick point of clarification on something that you said. Not rising to try to change your mind. I know how to read a room. I just wanted to note that with regard to the Custody assets that was only eligible to people in the United States. So when we get to that point, if that's a thing, that the collection risk you talked about in Motors Liquidation for, you know, service and for foreign entities is not really a concern in connection with this particular asset.

THE COURT: Okay. So we don't have the foreign service issues, but we may well have service issues in the U.S. I don't -- look, just so that the record is clear, the Court is declining to enter judgment in favor of the Custody account holders with respect to the crypto assets in the Custody -- held by Custody.

I'm also declining, even though there's no disagreement about the title to it, I decline to order those assets turned over to the Custody holders. I do so for three reasons at this point, the stipulation that counsel entered and the Court -- the Court entered, counsel approved

ECF Docket No. 1044; the agreement for how the procedures in this case would go forward. As to phase one at least for the Custody holders I believe we've resolved that issue. We're going to move forward with phase two.

I think you have all been overly aggressive in the schedule you've set, but you put it in the stipulation so either adjust the schedule or let us push forward with the schedule. I approved that stipulation. So --

CLERK: Your Honor --

THE COURT: Hold on. The basis for my ruling is the stipulation, ECF Docket No. 1044, Bankruptcy Rule 7013 which makes Federal Rule of Civil Procedure 13 applicable to adversary proceedings, the preference claims that the Debtors or someone authorized to act in the Debtors' place could assert their good faith claims. They are either compulsory counterclaims under 13(a) or permissive counterclaims 13(b). I don't have to fully resolve that issue. It certainly seems to me that they're compulsory counterclaims under 13(a)(1)(A) and (B).

The stipulation that the parties entered extended the time of the Debtors to answer the Custody holders complaint until the issues set forth in the stipulation setting forth the agreed schedule until they're resolved; they're not all resolved. And under Rule 7054(b), under these -- under the circumstances we've talked about today, I

would not exercise my discretion to enter partial judgment ordering that the Custody assets be returned to the Custody holders.

So that's my ruling. I'm not going to write a separate order on it. I'm so ordering the transcript and we'll push forward from there.

CLERK: Judge?

THE COURT: Yes.

CLERK: We have a raised hand.

THE COURT: Okay, let me hear.

CLERK: Mr. Mendelson, please unmute.

MR. MENDELSON: Yes --

THE COURT: Good afternoon, Mr. Mendelson.

MR. MENDELSON: Thank you, Your Honor, for acknowledging me again. As a layperson, I'm a little confused here because I'm confused if the estate is bringing a preference claims, if the estate is bringing up preference claims as Mr. Ortiz mentioned and as I believe you mentioned, the preference claims wouldn't just be against Custody. It would be against the $2 billion of assets that were removed from the platform including those international individuals, non-U.S. citizens. So it stretches beyond the 50,000 number that you mentioned.

And to me as a layperson sitting here, it's (audio drops) impossible that the Court would do that, would allow

that. Too much time, too much money. I don't know how we're going to collect from a dude in Bangladesh. And if that is not possible to do, then if the estate does bring up preference issues, it would only negatively affect U.S. citizens who are now stuck in Custody. The old adage, the man with the gold makes the rules. They have our gold. They would essentially be making the rules and we would be unfairly treated if that was the case, and I just wanted to bring that up. I don't see how the Court is going to allow preference for all the assets that were removed off the platform within 90 days.

And Mr. Dixon brought up that international users were not allowed Custody, which is 100 percent true, and to the benefit of all those international users that were able to remove assets off of the platform, unlike U.S. users who were not able to just remove assets off the platform, rather than go through Custody. I just want to bring it to your attention. I feel like right now this preference issue is just a filibuster and a time waster to get back our property that I believe that we own and deserve to be in possession back of, and I do appreciate your time.

THE COURT: Thank you, Mr. Mendelson. Let me just say this. I'm dealing with an adversary complaint filed by the Ad Hoc Group of Custody account holders. I'm not dealing with the account holders at large in the U.S.,

outside the U.S. I'm dealing only with the Custody account holders who filed the adversary proceeding.

The issue about the compulsory counterclaim only exists as of now as to those -- that group of people, not anywhere else in the world. The Custody is only people here in the U.S., but you know, one of the things that I think in good faith, both the Debtors' counsel, the Committee's counsel, and the Ad Hoc Committee's counsel have tried to do is identify things that are sort of what I would refer to as the gating issues.

If the Court can resolve them as to some groups of creditors, it may well be rules that would suggest the outcome as to everybody else. So that's what I'm trying to do. That's what I think the Ad Hoc Committees were trying to do. We'll see whether it accomplishes what the goal was or not, but -- so I appreciate your comments and your concerns.

Trust me when I tell you, I have concerns. I want this case to move forward. I want the creditors to recover as much as they possibly can as soon as they possibly can. And I don't -- my own, you know, people can disagree about this. I don't think that the Debtors' counsel or the Committee's counsel or Ad Hoc Committee's counsel have had any other goal than trying to get as many issues resolved as soon as possible.

You know, it's the same at the hearing yesterday, this came up, I think. The Debtors and the Committee have committed to this dual path, standalone restructuring, sale. The goal either way is to maximize the value of the estate so that you and every other account holder, whether they're in the U.S. or outside the U.S., can get the maximum recovery possible. And I'm trying to push this. Trust me when I tell you I'd be a lot happier myself if I wasn't spending day and night working on the issues in this case, okay, so I appreciate your comments.

Deanna, does anybody else wish to be heard?

MR. MENDELSON: Your Honor, if I may just respond really quickly?

THE COURT: go ahead, Mr. Mendelson.

Mr. MENDELSON: First of all, I absolutely do trust you. I think the U.S. Court system is the best Court system on the planet. However, when you, when you mentioned Custody and preference, aren't we talking about clawbacks? And if we're talking about clawbacks -- please correct me if I'm wrong -- if we're talking about clawbacks, clawbacks just don't apply to Custody. It would apply to everyone within that --

THE COURT: Well, it potentially -- it could. You know, the issues about Custody are different because there was this bright line of 89 days before. It's a -- look, if

you assume that the assets in the Earn account were property of the Debtors' estate, there was a transfer of that property to the Custody account holders, 89 days before. Ninety days is sort of one of the magic markers. For insiders, it's one year. But that's what tees this up. I can't, you know, I can't see around every corner and I'm trying to be careful not to rule on things that have unintended consequences, but I'm ruling on the things that are before me. So, but I appreciate your concerns.

Deanna, is there anybody else who wants to be heard?

CLERK: I do not see any raised hands, Judge.

THE COURT: All right.

CLERK: Sorry, Judge. Someone just raised a hand, Michael Yankoski.

THE COURT: All right, Mr. Yankoski, go ahead.

MR. YANKOSKI: Yes, Judge Glenn, Your Honor. Thank you for hearing me this me this afternoon and thank you for all your time on this. I simply want to raise the point that due to the fluctuating nature of the cryptocurrency markets and I assume that this is going to be a point that's brought up in the phase two hearings, but due to the massive volatility of the cryptocurrency markets, should retail clawbacks preference actions be brought against retail clawback -- retail customers of the Celsius

platform, it's highly likely that that would cause tens if not hundreds of thousands of personal bankruptcies because assets have been withdrawn during that 90 days, which may have, as Mr. Ortiz mentioned, collapsed by 40 percent or in some instances 80, 90 percent and the possibility of returning those to the Debtors' estate is virtually impossible -- not just procedurally impossible, but it's going to be literally impossible for tens, if not hundreds of thousands of retail customers. I'm sure you're aware that. I just wanted to put it on the record and bring it to attention. Thank you, sir.

THE COURT: Look, I'm not going to get into the issue of -- I'm not going to talk specifically about defenses available under the -- for a preference action under 547. The transfers to the Custody accounts sort of happened in, if not in one fell swoop, it happened pretty quickly. To the extent there were withdrawals in the ordinary course of business, for example, there may well be defenses. And I'm not ruling out the defense of ordinary course of business even here. But it just -- Mr. Yankoski, it raises a host of issues and there are a lot of good lawyers involved and we'll just have to see how it plays out.

Deanna, is there anybody else who wants to be heard?

CLERK: Yes, Cheryl Bierbaum.

THE COURT: Okay, Ms. Bierbaum, go ahead.

MS. BIERBAUM: Yes, Judge. Thank you for this time. I just want to relay I'm an advocate of course for all Custody and Withhold to be released, if that's what's deemed by the Court, but in the meantime, with this preference (audio drops), there was the discussion of pure Custody or pure Withhold accounts. Those would not be subject to preference, in my understanding. Is that something that could be determined to be released now as we're awaiting phase two for the remainder accounts?

THE COURT: And I'm glad you raised it because I did have it on my list of issues before we close today. Mr. Koenig, let me ask you to rise. Let's see if we can break it down into the group. So one group, is the pure Custody accounts. So people who never were in Earn and deposited into Custody, are there objections to returning that portion of the assets?

MR. KOENIG: For the record, Your Honor, Chris Koenig, Kirkland and Ellis, for the Debtors. We filed the motion three months ago. There were a variety of objections. I think it's difficult to say that there were no objections to that point because there were so many folks.

THE COURT: Let me -- I've considered this

carefully and their -- the objections are overruled. The -- what I would consider the pure Custody account holders, people who deposited -- their assets were not moved from Earn to Custody. There is no preference. There's no good faith argument of an avoidable preference against them. There's no dispute as to their having title and the assets should be returned to them. Prepare an order in appropriate format. Okay. So that's the group of the pure, what I would -- shorthand it by talking about the pure Custody account holders. Okay.

Then you've also included in your motion the account holders where the potential preference claim is below the statutory threshold, was, is it, $7,000 --

MR. KOENIG: $7,575, Your Honor, and that's the requirement of 547(ci)(9), so what we've been arguing about today is that the Debtors have prima facie preference claims, but we only have prima facie preference claims to the extent that transfer is in excess of the --

THE COURT: I agree. Is there anybody objecting to the return of assets from Custody for anyone with less than the 7,500-odd dollars?

MR. COLODNY: Your Honor, Aaron Colodny on behalf of the Official Committee. I believe we talked before about our position that it should be a pro rata distribution due to the shortfall. I think that that applies to both pure

Custody and the amount below to the extent you rule that only the amounts in the wallets would be subject to their property rights.

THE COURT: So Mr. Colodny, let me ask you. Is there -- how many coins is there a shortfall?

MR. COLODNY: I believe it's about 6 percent, Your Honor.

THE COURT: Six percent in --

MR. COLODNY: In aggregate amount of the obligations --

THE COURT: But how many coins?

MR. COLODNY: I believe there's a number of different currencies, so I don't know the number of coins.

THE COURT: So, you know --

MR. COLODNY: About $16.9 million.

THE COURT: I understand that. But as to people who deposited Bitcoin, is there a shortfall in Bitcoin?

MR. COLODNY: Meaning, do -- is all --

THE COURT: Maybe I'm --

MR. COLODNY: All of the --

THE COURT: Don't I have to resolve this issue on a coin-by-coin basis?

MR. COLODNY: I believe you do, Your Honor. I believe we said that in our papers.

THE COURT: Okay. And is there a disagreement?

Can the Debtors and the Committee agree on the coins as to which there is no shortfall? And would you agree that as to the Custody account holders, either the pure Custody account holders or the below the preference threshold, how many, who is -- how many are affected by a shortfall? They have to have deposited coins for which there is a shortfall, right?

MR. COLODNY: Right. To the extent there are sufficient coins in the Custody wallets to cover the obligations, I don't see any reason we couldn't agree with the Debtors to let those go.

THE COURT: Okay. Do -- have you and the Debtor tried to resolve that issue? I don't know what -- I don't know the numbers. I mean I don't know what, how many account holders, Custody account holders are faced with the issue of a shortfall in the particular coins that they deposited into Custody.

MR. COLODNY: I don't know the answer to that coin by coin, Your Honor, but I think that's something that either Mr. Koenig and I or our financial advisors could easily --

THE COURT: Well, let me -- Mr. Koenig come on up. Both of you stand at the podium. I'm forcing you to stand next to each other, even if you're unmasked. Has the Debtor tried to reconcile this?

MR. KOENIG: We were -- Your Honor, Chris Koenig.

We were expecting to get a ruling and to meet and confer with the Committee depending on the outcome of the phase one --

THE COURT: Meet and confer with the Committee.

MR. KOENIG: We certainly intend to do so. I mean, certainly there are some shortfalls. We'd like to reach a resolution that is efficient and makes --

MR. COLODNY: Your Honor, just clarification. We're looking at Docket No. 1532 which I think is the supplemental declaration of Oren Blonstein and exhibit -- I think this is Exhibit 1, shows as of petition date the shortfall. So we have the information.

MR. KOENIG: We'll speak with the Committee and find a way to resolve this and if we can't we can't, but one of the things -- in the original order that we attached to the motion, we recognized that actually opening up withdrawals and identifying which accounts are subject to the 7575 is not the easiest task and we committed to work with the Committee in that order that we would either agree on the schedule of individuals to have their coins, you know, they can be withdrawn because they're either pure Custody or they're below the 7575 cap and that we would work with the Committee to identify those individuals because there's, of course, you know, maybe somebody had both pure Custody and a transfer and so there's some work that I think

has to be done.

THE COURT: And then I think what you have to do -- and I see one of the pro se creditors wants to be heard and I'll hear from you in just a moment -- see if you can reach a stipulation agreement, then you're going to have to serve the account holders and give them a chance if any of them -- if they're getting back everything that they put in, I mean, you've still got to give them notice.

But the issue for those where there is a shortfall and -- so I understand that there was a difference in view between a pro rata distribution and lowest intermediate value. See if you can reach an agreement as to that. I don't know. I don't know how much of a delta that --

MR. KOENIG: I don't believe the dollar amount will be all that significant, but we can work with the Committee and our financial advisors.

THE COURT: Because you could easily spend more money figuring it out.

MR. COLODNY: And Your Honor, we don't have any interest in holding up distribution. So we're not standing before you to belabor --

THE COURT: Okay.

MR. KOENIG: We will figure it out and we will submit a proposed order and serve all account holders on whatever notice Your Honor believes is appropriate, whether

you'd like to be seven days' notice or more regular --

THE COURT: Fourteen days.

MR. KOENIG: Fourteen days' notice. Very good.

THE COURT: Let me -- Deanna, who's on the screen? I should recognize you because you spoke this morning.

CLERK: Tony Vejseli. My apologies if I mispronounce your name.

THE COURT: Go ahead. You've hung in there this afternoon, so --

MR. VEJSELI: Yes, I. Sorry. Tony Vejseli. I just wanted to make the point again, I know I made it before, but the Debtor and the UCC are trying to hold up the pure Custody for the ones that do have an active loan that is still good -- in good standing. So I just want to throw that out there.

THE COURT: Okay.

MR. VEJSELI: Thank you, Judge.

THE COURT: Thank you. Anybody else?

CLERK: Rebecca Gallagher.

THE COURT: Ms. Gallagher.

MS. GALLAGHER: Yes, Your Honor. I have looked into some of the things we were talking about earlier and indeed the Debtor does have an MSB license but that does not grant them the ability to offer a Custody service.

THE COURT: Ms. Gallagher, you don't have any

assets in a Custody account because you're not in the United States. You don't have any --

MS. GALLAGHER: No, I have all -- I have all my assets in Earn and every dollar that you pay to these people that doesn't get the same haircut that I will get, is a very --

THE COURT: Okay.

MS. GALLAGHER: -- unfair --

THE COURT: Okay --

MS. GALLAGHER: -- inequitable --

THE COURT: The objection is overruled. Okay.

MR. KOENIG: Your Honor, I just want to clarify for the record. So you are granting the motion with respect to pure Custody --

THE COURT: I am.

MR. KOENIG: -- and transferred Custody below the 7,575 --

THE COURT: Correct.

MR. KOENIG: -- threshold with the Debtor and the Committee to meet and confer about the pro rata issue.

THE COURT: Yes.

MR. KOENIG: The Court is not granting the order with respect to either pure Withhold or transferred Withhold?

THE COURT: Correct. I can't decide -- Ms.

Kovsky, you want to be heard further? I don't have everything decided today. Sorry if I'm disappointing you, but --

MS. KOVSKY-APAP: Your Honor, Deb Kovsky for the Withhold Group. I think that given where we are and the Committee raising objections, although the -- I think we and the Debtors are aligned that pure Withhold is not property of the estate and certainly, you know, anything that was newly deposited on should go back promptly to the account holders since there's no possible preference claim there.

THE COURT: Let me ask. Mr. Koenig, is that correct? The Debtor agrees with Ms. Kovsky about the pure Withhold?

MR. KOENIG: Your Honor, I -- Chris Koenig. I agree. The pure Withhold is different than the transferred Withhold.

THE COURT: Okay. And Mr. Colodny, do you disagree?

MR. COLODNY: We do, Your Honor, with respect to the pure Withhold that is not the BNB or other tokens that were not supported by the Debtors.

THE COURT: Just articulate for me briefly why you --

MR. COLODNY: So BNB tokens are I think less than half a percent of pure Withhold. The majority of pure

Withhold are unaccredited investors who transferred to the Debtors and the Debtors could not support it but took the assets and used them as if they were their own. And it's our position that by taking the assets, using it as their own, they exercised control over the --

THE COURT: They comingled and deployed the assets.

MR. COLODNY: Correct, and so to take those assets and to distribute them now would take them away from other Earn holders that may have an equal entitlement into those assets.

THE COURT: But there is some group of Withhold account holders who deposited --

MR. COLODNY: BNB tokens, other unsupported tokens.

THE COURT: You agree as to them?

MR. COLODNY: Provided that the Debtors have them sitting in their bank accounts, I don't have any problem releasing those.

THE COURT: Mr. Koenig, is there some group of them that could be returned?

MR. KOENIG: Chris Koenig. I believe so, Your Honor. We'll work with the Committee --

THE COURT: Work with the Committee and Ms. Kovsky. I would like whoever can get their property back

now, I'd like them to get it back now.

MR. KOENIG: We agree, Your Honor.

THE COURT: Okay. Mr. Ortiz?

MR. ORTIZ: Sorry, Your Honor. Good afternoon again. Kyle Ortiz for the Custody Group. We have a couple of people who either in whole or in part are pure Custody, so we'd just ask to be part of those discussions. We're --

THE COURT: Absolutely.

MR. ORTIZ: -- definitely not going to do anything to slow it down.

THE COURT: I agree.

MR. ORTIZ: Thank you, Your Honor.

THE COURT: Okay.

CLERK: Sorry, Judge. We have a few more raised hands.

THE COURT: Okay. Take them in the order in which they raise their hands.

CLERK: Okay, John Bazolist.

MR. BAZOLIST: Yes, thank you. So Judge, I appreciate your time today. I actually had asked a question earlier and as it seems with this case, there are a lot of edge cases, so this one relates to the Custody and pure Custody. If somebody had funds in Custody that were -- had touched Earn at one point who had subsequently transferred additional pure Custody funds over to Custody, is it fair to

say that those additional pure Custody funds are eligible for repayment but not the original Custody funds?

THE COURT: Mr. Koenig?

MR. KOENIG: Your Honor, I --

THE COURT: I think.

MR. KOENIG: Make sure I heard the question correctly. To the extent that were pure Custody funds that were never in Earn but there were also funds that were in Earn and were transferred to Custody, are the pure Custody funds still eligible? The answer is yes.

THE COURT: Yes.

MR. KOENIG: From our perspective because --

THE COURT: Yes.

MR. KOENIG: -- there was no transfer --

THE COURT: I agree.

MR. KOENIG: -- of the Debtors' interest in property.

THE COURT: I hope that answers the question. With respect to the pure Custody -- and you'll get notice and an opportunity to object if you disagree. And it ought to set out clearly if there's some people that a combination of Earn that moved over versus pure Custody, that that's explained.

MR. KOENIG: We'll do our best to explain the mechanics because it will be a little bit complicated and

we'll work with the Committee, Your Honor.

THE COURT: Okay. All right.

MR. BAZOLIST: Just one additional wrinkle there. If you're not pure, if your original Custody funds are over that statutory limit, but your pure Custody is under that statutory limit, does that disqualify you or are you still eligible for those funds?

THE COURT: Pure Custody, there's no preference issue.

MR. KOENIG: Correct. The Debtor agrees.

THE COURT: Yeah. Yeah, as to the pure Custody, there is no preference issue because it wasn't property of the estate that was transferred into a Custody account. For property that was in an Earn account and was transferred to Custody, that raises the preference issue.

MR. BAZOLIST: Okay, understood.

THE COURT: Okay. Anybody else?

CLERK: We have Tony Vejseli again -- I'm sorry, I keep mispronouncing your name.

MR. VEJSELI: All right --

THE COURT: You're getting close, though.

MR. VEJSELI: Yeah, that's good enough. You got there. Sorry, this is the last one for me. I just wanted just more clarity from the Debtor. I just want to make sure that they're aware of the situation I'm talking about and I

don't really care too much about myself, but I know there's a lot of people that fall under the 7,500 threshold, but they have an active loan as well. So just want clarity on if those people would get their pure Custody or Custody under the 7,500 back.

MR. KOENIG: Again, Chris Koenig. Our position is that there's a potential setoff between whether it's 7,575. That's a different issue than the preference. So that's why we --

THE COURT: -- different issue. We haven't -- the Court has not dealt with the issue of loan and collateral for loans.

MR. KOENIG: That's right, Your Honor, and that's why we included that carveout in the motion that we filed.

THE COURT: That's not getting resolved today. All right. I'm not going to hear from anybody I've already heard from.

CLERK: There are a few people that had raised hands, but they lowered them so I don't see anyone else's hands right now.

THE COURT: Thank you. Thank you, Deanna. All right. I think from the Court's standpoint, the most important thing is you need to consult regarding the schedule. Obviously, there are issues about orders, returning some assets that are not really in dispute. It's

an aggressive schedule and that's fine if you all want to spend your Christmas, New Year's holiday doing all that.

If, you know, if you all come to an agreement for any adjustments in the schedule, put it into a proposed stipulation and give it to me. I've committed to moving forward expeditiously. Okay.

MR. KOENIG: Wonderful. Thank you, Your Honor. One last housekeeping point for tomorrow. I believe tomorrow's hearing was initially noticed as a hybrid Zoom in case this matter bled into tomorrow. Would you like the hearing to be hybrid as well or to go back to --

THE COURT: No, I think we can go Zoom, but let me raise this question now. So you filed three new Debtor cases. And trust me, when I say I haven't looked at a piece of paper or a computer screen dealing with three new cases. When I approved bidding procedures, I -- my assumption was because there was -- what was proposed to be sold was the equity of non-Debtors held by, you know, directly or indirectly by a Debtor.

And do I assume that what's happened now is the buyer wants to buy assets free and clear and doesn't want just the equity and so he filed three Debtor cases? Is that kind of --

MR. KOENIG: That's exactly right, Your Honor. That's to effectuate --

THE COURT: And you really expect me to spend my night reading all these papers and figuring out and approving a sale tomorrow?

MR. KOENIG: Your Honor, we're happy to reschedule --

THE COURT: We'll have a hearing, but don't count on getting relief.

MR. KOENIG: Understood. Is this on the sale or the first days or both?

THE COURT: I haven't even looked at -- all I've done for days is read papers for yesterday, for Monday, and today. You know, and I heard from my law clerks that they got a call that Debtors were intending to file additional cases. Then we weren't told which ones. Then we were told, well, because of Israel, they -- not ready to file the cases yet. Get them pushed.

And I saw on an email that I had three new cases. So the cases filed. I haven't looked at a single page. I presumed that what happened was the buyer wanted to buy assets free and clear, understand why, okay. Was -- I don't know, I mean, I'll ask these questions tomorrow or answer it now. Did the auction provide bid on assets, bid on shares? Was it a -- you know, was the auction process a fair process? Did people know they could bid on some or all of the assets, the equity?

MR. KOENIG: Your Honor, from very early on in the process, bidders indicated an interest in buying only the assets because they wanted the free and clear order. And I believe, and we can --

THE COURT: I don't remember what's in the bidding procedures.

MR. KOENIG: Right, right.

THE COURT: Whether it said assets --

MR. KOENIG: But my understanding is --

THE COURT: I couldn't approve. They weren't debtors so --

MR. KOENIG: Right.

THE COURT: The assets weren't the assets of the Debtor.

MR. KOENIG: Right. But the buyers, the bidders were aware from very early on that an asset sale was the most likely outcome because that's what they indicated to the Debtors that they were interested in, and of course, they're the ones that are --

THE COURT: Surprise, surprise.

MR. KOENIG: -- writing the check. They're the ones that are writing the check, so of course --

THE COURT: I understand that.

MR. KOENIG: -- we talked to them about that. We talked to them about that structure, you know, for a very

long time. I don't believe that anybody was surprised but we're happy to -- I don't think that any bidder would be surprised to say, oh I would have bid if I knew I could --

THE COURT: How many NDAs were signed?

MR. KOENIG: Your Honor, I don't have that in front of me. I apologize.

THE COURT: Did every party who signed an NDA -- I'll ask this question tomorrow. Did every party who signed an NDA know that they could also evaluate whether to bid on assets, bid on stock, bidding on assets would in all likelihood require that the Debtor cases be filed? Are these -- is it a foreign Debtor in Israel? Is that --

MR. KOENIG: That's right, Your Honor, and there would be a chapter -- there would be the equivalent of a Chapter 15 recognition and proceeding in Israel.

THE COURT: In Israel.

MR. KOENIG: In order to recognize the sale in the United States, and that's part of the reason for the timing here, is of course we want the sale to close as promptly --

THE COURT: Have you laid it all out in a set of papers that I can pull off my computer and --

MR. KOENIG: I believe it's in the papers that were overnight and this morning.

THE COURT: I'll look at them, but no guarantee.

MR. KOENIG: Understand.

THE COURT: I understand the reason for the -- how many bidders were there?

MR. KOENIG: Your Honor, I --

THE COURT: Mr. Nash, how many bidders were there?

MR. NASH: Good afternoon, Your Honor. Pat Nash from Kirkland and Ellis for the Debtors. Of course we'll make this case tomorrow, Judge, but there was a larger universe of initially interested bidders which came down to then a very small universe of actual bidders. The evidence tomorrow will suggest that all bidders understood the rules of the road and what was available.

In light of Your Honor -- before we filed the cases and this is, you know, an interesting case, came at everybody so fast and came at the Court so fast that there have been a few times where we've, the Debtors have started down one direction and then, you know, recalibrated a bit the issue that you heard so much about today being frankly only one of those issues.

But as soon as the bidders and what became actively, you know, written about in the press and whatnot is this issue that, you know, where do the customers have claims. Do the customers potentially have claims at GK8 and so who the heck is going to buy the equity of GK8 only to find out that they are liable for billions?

THE COURT: Yeah, that's why I say, surprise,

surprise. They want to buy assets free and clear.

MR. NASH: Right. So Your Honor -- and we'll see how it goes tomorrow in terms of, you know, just how abrupt the notice is and what it is Your Honor has been able to digest or not digest.

If it's not tomorrow, I think you'll be comfortable that at some point soon thereafter, I do think that we will be able to put on a case that as it relates to the GK8 assets and the process, we have elicited the highest and best value and, you know, frankly if Bill Gates or somebody wants to show up with a suitcase full of cash, you know, it's not final until we drop the gavel, but I think, Your Honor, with the benefit of the hearing tomorrow, we'll be able to satisfy your concerns.

THE COURT: Okay. I'm not making any promises.

MR. NASH: Understood.

THE COURT: We'll go forward with the hearing. It'll be a Zoom hearing.

MR. NASH: Okay, Judge. Thank you.

THE COURT: Thank you, Mr. Nash. All right --

CLERK: Sorry to interrupt, Judge. We have a few new hands.

THE COURT: No.

CLERK: I don't know --

THE COURT: It's over. I --

CLERK: Okay.

THE COURT: All the issues as to which people are entitled to be heard have been heard. We'll deal with -- I had questions about the hearing for tomorrow. Those issues will be taken up at the hearing tomorrow. I've expressed my frustration at newly filed cases and the -- anyway. We're adjourned.

MR. KOENIG: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 11:03 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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